117-430

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 144.

WILLIAM STONE, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED OCTOBER 24, 1882.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of South Carolina, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said action before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of South Carolina against David T. Corbin and William Stone, copartners, under the firm name of Corbin & Stone, wherein
2 was drawn in question the construction of a statute of *of* the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under the statute, a manifest error hath happened, to the great damage of the said William Stone, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Chief Justice of the said Supreme Court, the fifteenth day of March, in the year of our Lord one thousand eight hundred and eighty-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
W. D. SIMPSON,
Chief Justice Supreme Court, South Carolina.

Attest: ALBERT M. BOOZEE,
Clerk of Supreme Court of South Carolina.

[Seal Supreme Court of South Carolina. *Nil ultra.*]

[Endorsed:] Writ of error. Supreme court of South Carolina. Clerk's office, Columbia, S. C. Filed Apr. 11, 1882. Albert M. Boozee, clerk. Original.

3 The United States of America to the State of South Carolina, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of South Carolina, wherein Corbin and Stone are plaintiffs in error and you are defendant in error, to show cause, if any there be, why said judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the said William Stone in that behalf.

Witness the Honorable William D. Simpson, chief justice of the supreme court of the State of South Carolina, this fifteenth of March, in the year of our Lord one thousand eight hundred and eighty-two.

W. D. SIMPSON, [L. S.]
Chief Justice Supreme Court, South Carolina.

4 On this twelfth day of April, in the year of our Lord one thousand eight hundred and eighty-two, personally appeared Baylis T. Earle before me, the subscriber, Albert M. Boozee, clerk of the supreme court of South Carolina and notary public of said State, and makes oath that he delivered a true copy of the within citation to Honorable Leroy F. Youmans, attorney general of the State aforesaid, by leaving a copy of the same at his office on 12th April, 1882.

BAYLIS T. EARLE.

Sworn to and subscribed the twelfth day of April, A. D. 1882.

ALBERT M. BOOZEE, [L. S.]
Clerk of Supreme Court of S. C. & Notary Public of S. C.

[Seal Supreme Court of South Carolina. *Nil ultra.*]

[Endorsed:] The United States of America. Supreme court. William Stone, plaintiff in error, ag'st The State of South Carolina, def't in error. Citation. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed Mar. 15, 1882. Albert M. Boozee, clerk.

5 *Record.*

Supreme Court, Fifth Circuit.

STATE OF SOUTH CAROLINA:

THE STATE OF SOUTH CAROLINA, Respondent,
vs.
D. T. CORBIN and WILLIAM STONE, as Copartners under the Firm Name of Corbin & Stone, Appellants.

Wm. E. Earle, 1328 New York avenue, Washington, D. C., appellants' attorney.
Attorney Gen. Youmans.
Hon. Ch. Richardson Miles, respondent's attorney.

6 STATE OF SOUTH CAROLINA, *Richland County:*

THE STATE OF SOUTH CAROLINA, Plaintiff,
against
DAVID T. CORBIN and WILLIAM STONE, as Copartners under the Firm Name of Corbin & Stone, Defendants.

I, William Stone, one of the above-named defendants, without waiving my right to move for the removal of the above-entitled action from the circuit court of Richland county, in the State of South Carolina, to the United States circuit court for the district of South Carolina, so far as the said action concerns me, but for the purpose of relieving the plaintiff from the necessity of service of summons by publication, do hereby admit service of a copy of the complaint herein upon me by mail on the 27th day of December, 1877, at the city of New York, State of New York.

WILLIAM STONE.

THE STATE *vs.* CORBIN & STONE.

EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL,
COLUMBIA, S. C., *Feb.* 18, 1878.

Messrs. Earle & Wells, att'ys-at-law, Greenville, S. C.

GENTLEMEN: Yours enclosing Stone's acceptance, enclosing Mr. Stone's answer, and Mr. Corbin's answer rec'd at different dates. I have accepted due service of original answers The copies, with your letter of Feb. 11, I have sent to General Connor, who is associated with me in the case, and as soon as I hear from him, which I expect to do at a very early date, I will answer your letter fully.

Very respectfully,

LEROY F. YOUMANS,
Attorney General.

7 Do, if you have any to spare, send me two copies each of the complaint and answers printed.

Know all men by these presents that I, William Stone, of the city of New York, county and State of New York, am held and firmly bound unto the State of South Carolina, its successors and assigns, in the sum of two hundred (200) dollars, lawful money of the United States, to be paid to the said State of South Carolina, its successors and assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, forever by these presents.

Sealed with my seal and dated the 26th day of January, in the year eighteen hundred and seventy-eight.

Whereas the above-named State of South Carolina has commenced an action in the circuit court of the county of Richland, and State of South Carolina, against William Stone and David T. Corbin as copartners under the firm name of Corbin & Stone, and whereas the said William Stone has entered his appearance in such action in said court, and has filed his petition for the removal of said cause

into the next circuit court of the United States for the district of South Carolina, to be held on the first Monday of April, in the year eighteen hundred and seventy-eight:

Now, therefore, the condition of this obligation is such that if the said William Stone shall enter in said circuit court of the United States for the district of South Carolina, on the first day of its session, copies of the process against him in this action and of all pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting him, and shall also appear in said court and enter special bail in the cause, if special bail was originally requisite therein, these presents and obligations shall be void; or otherwise, to remain in full force and virtue. And as an additional
8 security the said William Stone hereby brings into court and offers to deposit with the clerk thereof, subject to the order of the court, in the event of a breach of the above obligation, two certain bonds of the United States, payable to the said William Stone, and by him made payable and transferable to the order of this court in this action, said bonds being for the sum of one hundred ($100) dollars each, payable on the first day of July, 1881, with interest thereon at the rate of six per cent. per annum, payable semi-annually.

If the above obligation shall be complied with by said William Stone, the said bonds are to be returned to him.

WILLIAM STONE.

Signed, sealed, and delivered in the presence of—
CHESTER WOLVERTON.

THE STATE OF SOUTH CAROLINA
against
D. T. CORBIN & WILLIAM STONE.

Take notice that within is a copy of a bond which Wiliam Stone, one of the defendants in this action, hereby offers to give upon the removal of this cause to the circuit court of the United States for the district of South Carolina, so far as it affects him.

WM. E. EARLE,
Defendant's Attorney.

THE STATE OF SOUTH CAROLINA, *Richland County:*

THE STATE OF SOUTH CAROLINA
against
D. T. CORBIN and WILLIAM STONE, copartners under firm name of Corbin & Stone.

To the circuit court for Richland county:

9 I. The petition of William Stone shows that an action has been brought in this court against him and David T. Corbin by the State of South Carolina, the plaintiff above named.

II. That the action is brought upon the following cause: To recover a certain balance alleged to be due to the plaintiff by the peti-

tioner and his said codefendant from the moneys alleged to have been paid to and received by the firm of Corbin & Stone, to the use of the plaintiff in a certain cause entitled "The State of South Carolina against The South Carolina Phosphate Company, limited," otherwise known as the "Oak Point Mines."

III. That the matter in dispute, exclusive of costs, exceeds the sum of five hundred dollars, as appears by the summons and complaint herein.

IV. That the petitioner is now, and was at the time when this action was commenced, a citizen of the State of New York and a resident therein, and his codefendant is a citizen of South Carolina, and the plaintiff is also a citizen of the State of South Carolina. That under and by virtue of the statutes of the United States and of the State of South Carolina this suit is one in which there can be a final determination of the controversy, so far as the petitioner is concerned, without the presence of his codefendant as a party in the cause.

V. That no trial has yet been had in the said cause.

VI. That petitioner hereby offers good and sufficient security for entering in the next circuit court of the United States for the district of South Carolina, on the first day of its session, copies of the process against him in this action, and of all pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein.

Your petitioner therefore asks that said cause may be removed for trial into the next circuit court to be held in the district
10 where the same is pending, to wit, into the next circuit court of the United States for the district of South Carolina, pursuant to the provisions of the statutes of the United States in such case made and provided, and that this court do accept the surety offered by your petitioner as aforesaid, and do proceed no further in said cause, and for such other and further relief in the premises as may be just.

WILLIAM STONE.

STATE OF NEW YORK, }
City and County of New York, } ss.:

William Stone, being duly sworn, says that he has read the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

WILLIAM STONE.

Sworn to before me the 26th day of January, 1878.

CHESTER WOLVERTON,
Notary Public.

STATE OF SOUTH CAROLINA, *Richland County:*

In Circuit Court.

THE STATE OF SOUTH CAROLINA *against* CORBIN and STONE.

Rec'd April 27, 1878, of Wm. E. Earle, attorney for defendant, Stone, two registered bonds of the Government of the United States for one hundred dollars each, deposited as security on motion to transfer case as to him to the circuit court of the United States.

[SEAL.] D. B. MILLER,
C. C. P. & G. L.

11 STATE OF SOUTH CAROLINA, *Richland County:*

THE STATE OF SOUTH CAROLINA *against* CORBIN & STONE.

Take notice that upon the petition of the defendant, of which a copy is hereto annexed, and which was filed in this court on the 27th day of April, 1878, and upon the undertaking of the petitioner and the offer to deposit certain United States bonds to secure the same, a copy of which undertaking is also annexed, this court will be moved on the 27th day of April, 1878, that the petition be granted, and that this court accept the surety offered and proceed no further in the said cause so far as it concerns the petitioner, and that the same be removed, so far as he is concerned, to the circuit court mentioned in the petition, and for such other and further relief as may be just.

WM. E. EARLE,
Defendant's Attorney.

This application was argued before his honor Judge Shaw by Mr. Earle, for petitioner, and Mr. Attorney General Youmans *contra* at Columbia, during the spring term, 1878, but no order appears to have been made, as the judge died shortly after, and the petition, with his argument, *were* returned to Mr. Earle by Mr. Youmans in April, 1880.

Mr. Attorney General Youmans also made a motion in the circuit court of the United States at Charleston during the April term, 1880, to remove the cause to the State court for want of jurisdiction on this ground:

1. That the State was a party; and
2. That it was not a case in which a several judgment could be rendered.

No decision has been filed.

12 STATE OF SOUTH CAROLINA, *Richland County:*

In the Common Pleas.

THE STATE *against* CORBIN & STONE.

The defendants, by William E. Earle, Esq., their attorney, by way of a supplemental answer to the plaintiff's complaint, herein further say:

That since the service of the answers of the defendants to the complaint in the above-entitled cause were served on the plaintiff's attorney, and on the twenty-seventh day of April, 1878, the defendant, William Stone, filed his petition in the said court for the removal of the said cause, so far as it affects him, to the circuit court of the United States for the district of South Carolina, in accordance with the provisions of the acts of Congress in such case made and provided, and then and there tendered to the said court good and sufficient surety as required by law, for the removal of said cause as to him. That thereafter, and on the seventeenth day of November, 1878, the said William Stone by the said William E. Earle, his attorney, did file in the said circuit court of the United States for the district of South Carolina, within the time and on the day fixed by the statutes of the United States, a copy of the proceedings in the said cause, and of all process, depositions, &c., therein, and the said cause has since the last-mentioned day been upon the calendar of the said United States circuit court of the district of South Carolina, and the said court has taken jurisdiction of the same so far as the same affects the said William Stone.

That by reason of the premises and of such removal as aforesaid this court has no longer any jurisdiction of the said cause so far as the same relates to the said William Stone, and defendants ask
13 judgment in favor of said William Stone, one of the above-named defendants against the plaintiff, for the dismissal of the said complaint as against him, and for his costs of action herein.

WM. E. EARLE, *Def't's Att'y.*

STATE OF SOUTH CAROLINA, *County of Greenville:*

Before me personally comes William E. Earle, attorney for the defendant, William Stone, and makes oath that the matters and things contained in the foregoing answer are true of his own knowledge, except as [to] those stated on information and belief, and as to those he believes it to be true. That the reason why deponent makes this affidavit is because the said William Stone is a non-resident of this State, and the facts come specially within deponent's knowledge by reason of his professional connection with the cause.

WM. E. EARLE.

Sworn to before me this 31st day of January, 1880.

GEO. WESTMORELAND, *Not. Pub.*

Mr. Earle, on behalf of the defendant Stone, called the attention of the court to this record and these facts and moved that the case proceed against the defendant Corbin alone, and that an entry be made on the record that as to defendant Stone it has been transferred to the circuit court of the United States. This motion was refused, the court holding that it had jurisdiction as to said Stone also, and that the trial proceed as to both defendants.

The defendant Corbin interposed the following objection to the jurisdiction by way of oral demurrer:

STATE OF SOUTH CAROLINA, *Richland County:*

Court Common Pleas.

STATE OF SOUTH CAROLINA
vs.
D. T. CORBIN and WILLIAM STONE, Copartners, &c.

14 Now comes defendant, D. T. Corbin, by his counsel, and brings to the attention of the court that neither the comptroller general of South Carolina, who directed this suit to be instituted, or the attorney general of South Carolina, who filed the complaint herein, had or have any authority in law to commence or prosecute the same on the part of the State, and therefore this court has no jurisdiction thereof and should dismiss the same.

This plea is overruled.

J. H. HUDSON.
WM. E. EARLE,
Defendant's Attorney.

STATE OF SOUTH CAROLINA, *Richland County:*

Court Common Pleas. Stated Term, July, 1880.

THE STATE OF SOUTH CAROLINA
vs.
D. T. CORBIN and WILLIAM STONE, Copartners doing business under the style of Corbin & Stone.

The defendant, David T. Corbin, by his attorney, William E. Earle, Esq., voluntarily appeared without service of summons, and filed his answer in said cause. Same was served the 18th day of February, A. D. 1878; but he was afterwards arrested and gave bond, April, 1879.

The complaint and answer are appended hereto.

The issues in this action were brought on for trial before Judge Hudson and a jury, at a court held in said county, on the 26th day of July, 1880.

This action was brought by the attorney general, at the request of the comptroller general, without any action of the General Assembly, against Corbin and Stone for money collected by them
15 as attorneys for the State in an action against the South Carolina Phosphate Company, limited, *alias* the Oak Point Mines. The total amount collected was $28,000, besides $235.07 costs, whereof the defendants claimed the sum of $17,737.34 as compensation for their services in said cause under the order of court. They also claimed the sum of $10,056.60 as due to them for services rendered, at the instance of the comptroller general, under the act of Assembly, in the Savannah & Charleston R. R. case, which services were afterward approved by the attorney general, as shown by his letter. The balance was paid to the State treasurer, to wit, $206.06. The defendants claimed a settlement with the comptroller general and the payment of $206.06 to the treasurer in accord and satisfaction; also set up the account for $10,056.60 for services in the S. & C. R. R.

case, which was proven to be reasonable and just as a counter-claim, together with a demand for moneys loaned the State treasurer to take up pay certificates of members of the Legislature which are in the hands of defendants. Testimony was proposed to be offered to show that these members had received less of their salaries, by the amount paid them out of this loan, and that thereby the State had directly received the benefit of it, which testimony was excluded by the court.

The plaintiff, to maintain the issues on its part, introduced a copy of a part of the record of the court of common pleas for Beaufort county in the cause entitled "State of South Carolina against The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines." The part of the record read and referred to is set out in the "appendix" to the "correspondence between Messrs. Corbin & Stone and the State officers of the government of the State of South Carolina produced as exhibits by the defense in this cause." Same appears in this record as appendix to said correspondence.

The plaintiff further introduced oral testimony tending to show that, in determining and decreeing the rate of compensation
16 ("sixty-two and one-half per cent. of the money collected in the cause") to be paid Corbin & Stone for their professional services rendered in the case of State of South Carolina against The South Carolina Phosphate Company, *alias* The Oak Point Mines, the referee and court had reference to the small decree for $5,984 of July 12, 1875, and not to the fund collected in the cause under the decree of November 11, 1875.

The defendant objected to this testimony, but the objection was overruled, and defendant excepted.

The defendant, D. T. Corbin, to maintain the issues on his part, produced the "correspondence between Messrs. Corbin & Stone and the State officers of the government of the State of South Carolina." The same was presented in pamphlet form, and is appended as a part of this record.

The said defendant further introduced testimony to show that there had been collected and received by him and his late copartner, William Stone, in the said cause of State of South Carolina Phosphate Company, limited, *alias* The Oak Point Mines, the sum of twenty-eight thousand dollars principal sum, and two hundred and thirty-five dollars seven cents costs; that said money was collected and received under and in pursuance of the decree in said cause of November 11, 1875; that the three receipts given upon receiving said money by Corbin & Stone were as follows:

Received at Charleston, S. C., November, A. D. 1875, from David Roberts, agent of the defendants in the case of State *vs.* The South Carolina Phosphate Company, *alias* The Oak Point Mines, eighteen thousand dollars on account of the moneys reported to be owing the State in the report of Asher D. Cohen, referee, of November 9, 1875, and to be paid to us by order of the court made on said report in said cause.

CORBIN & STONE,
Attorneys for the State.

NOVEMBER 26, 1875.

Received of David Roberts, agent, ten thousand dollars, on account of decree granted in case of State *vs.* The South Caro-
17 lina Phosphate Company, limited, *alias* The Oak Point Mines.

This is in full of said decree, save costs, which remain to be adjusted.

CORBIN & STONE,
Attorneys for the State.

Received February 4, 1876, two hundred and thirty-five dollars and seven cents of David Roberts, agent, through Messrs. Simmons & Simmons, attorneys, as the taxed costs in the case of State *vs.* The South Carolina Phosphate Company, *alias* The Oak Point Mines.

CORBIN & STONE,
Attorneys for the State.

The defendant, D. T. Corbin, further produced testimony tending to show that he and his late copartner, William Stone, had rendered professional services to the State of South Carolina in the suit of Thomas C. Dunn, comptroller general of South Carolina, against The Savannah and Charleston Railroad Company, and at the instance and request of the comptroller general of South Carolina, and the said services were reasonably worth the sum of $10,056.60; that the same was due and unpaid by the State to Corbin & Stone at the time of bringing this suit; also, that an itemized account of said services had been duly rendered said comptroller general of South Carolina, and been duly approved by him.

The said defendant further produced testimony tending to show that a final and complete accounting and settlement with the State, through Thomas C. Dunn, comptroller general, for all moneys collected and received in the aforesaid cause, had been made by said Corbin & Stone, and the balance found to be due the State from them ($206.06) had been paid over to the State treasurer, S. L. Leaphart.

The said defendant further offered testimony tending to prove that at the time of the commencement of this suit there was, to wit, December 20, 1876, due to this defendant, D. T. Corbin, from the State of South Carolina, for money loaned said State, the sum
18 of $18,770. That the same is now past due and unpaid.

That same, with interest at the rate of seven per cent. per annum, is now due to this defendant.

This evidence was excluded by the court, and defendant excepted.

Said defendant, D. T. Corbin, produced evidence tending to show that at the time of the commencement of this suit there was due to him from the State of South Carolina, on account of warrants drawn in his favor by the comptroller general on the State treasurer, the further sum of eight hundred dollars. That same is now due and unpaid.

This testimony was excluded by the court, and said defendant excepted.

The defendant's attorney submitted the following prayer for charge:

THE STATE OF SOUTH CAROLINA, *County of Richland:*

In Circuit Court.

THE STATE OF SOUTH CAROLINA, Plaintiff,
against
D. T. CORBIN, Defendant.

The court is respectfully requested to charge the jury that—

The report of Asher D. Cohen, Esq., special referee in the case of South Carolina *against* The S. C. Phosphate Co., *alias* The Oak Point Mines, as to the compensation of Corbin and Stone for professional services therein, and which was confirmed and made, the
19 judgment and decree of the court determined and decided that they would have therefor sixty-two and a half per cent. of the fund collected in that cause.

If the jury find that there were $28,235.07 collected in that cause by Messrs. Corbin and Stone then they would find that sixty-two and a half per cent. thereof was rightfully retained by said Corbin and Stone for their services rendered in said cause; that they were entitled to said sum and $324.50 more by said decree.

This is correct and is so charged.

J. H. HUDSON.

Second. That if there was an agreement of settlement made between Thomas C. Dunn and Corbin & Stone claiming adversely, and in and by said agreement it was stipulated upon a full statement of the amount between them that the sum of $206.06 should be paid by said Corbid and Stone as the balance due to the State, and that thereupon said balance was paid, then that was an accord and satisfaction and the defendant is entitled to a verdict.

This proposition would be good law provided the comptroller is an officer authorized by law to make the settlement and bind the State; but such he is not, and therefore the proposition is refused.

J. H. HUDSON.

The court is requested to charge the jury that the following letters in evidence, to wit, the letter of Corbin & Stone to Thomas C. Dunn, comptroller general, of February 1, 1877, and enclosure; and the letter of said Thomas C. Dunn, comptroller general, to Corbin & Stone, of February 10, 1877; and the letter of Corbin & Stone to Thomas C. Dunn, comptroller general, of March 5, 1877; and the letter of Thomas C. Dunn, comptroller general, to F. L. Cardozo, State treasurer, of March 8, 1877, are unquestioned, and that they show that Corbin & Stone requested a settlement, on the part of the State, of the differences existing between it and them and proposed terms of settlement.

20 The said comptroller general responded favorably to said proposal for settlement, consenting and agreeing to the same, but adding as a proviso that said Corbin & Stone should conduct the suit, the comptroller general against the Savannah and Charleston R. R. Co., to conclusion in the United States Supreme Court without further charge in that behalf.

That Corbin & Stone assented to this and restated the amount of their account, and showed that, by the proposed settlement, there would be a balance due the State of $206.06, and offered to pay the same.

That thereupon the comptroller general, Dunn, certified a settlement between himself, as comptroller general, on the part of the State, with Corbin and Stone. He says: "By a settlement this day made by Messrs. Corbin & Stone, in the case of the Oak Point Mining Company, they are indebted to the State of South Carolina a balance amounting to two hundred and six $\frac{6}{100}$ dollars, which amount you will please collect from them."

These letters show that the minds of the parties met, and that a settlement was agreed upon.

The letter and receipt of State Treasurer S. L. Leapheart to Corbin & Stone of June 9, 1877, shows that Corbin & Stone carried out the terms of the said settlement made by paying over to the State the amount of money ($206.06) which was required by the terms of said settlement.

That the following letters, to wit, the letters of William Stone, of Corbin & Stone, to Comptroller General Hagood, of August 20, 1877, and the letter of Attorney General Youmans to D. T. Corbin, of January 15, 1878, and the letter of D. T. Corbin to Attorney General Youmans of January 20, 1878, all together show a readiness on the part of Corbin & Stone to perform the service required of them by the terms of said settlement. That all these letters together show an agreement of settlement by and between Comptroller General Dunn, on the one part, and Corbin & Stone on the other part, and a compliance therewith in every particular by the said Corbin & Stone.

21 That this settlement so made and carried out is final and conclusive as to the matters embraced therein, at least that the subsequent comptroller general is bound thereby, and has no authority in law to set aside the same and demand a readjustment and settlement of said matters with Corbin & Stone.

The jury should find a verdict for the defendant.

This proposition is correct, except as it requests the judge to charge matters of fact, and except in its conclusion that the said settlement is binding on the State. In these it is erroneous, and for these reasons the propositions *is* refused.

J. H. HUDSON,
Presiding Judge.

Request court to charge that there was no decree after the 4th of November, 1875, when the fee of Corbin & Stone was fixed, under which money was collected in the cause, until the decree of November 11, 1875, which decreed the sum of $28,000 to be paid, and under which the evidence shows Corbin & Stone collected whatever money was collected by them.

Declined, as it is a request to charge a fact.

J. H. HUDSON.

The jury found a verdict for $23,728.44, with interest from July 8, 1876.

THE STATE OF SOUTH CAROLINA, *County of Richland:*

In Circuit Court. Exceptions.

THE STATE OF SOUTH CAROLINA, Plaintiff,
against
CORBIN & STONE, Defendants.

To his honor Judge Hudson, presiding judge, Attorney General Youmans, and Daniel B. Miller, clerk:

Please take notice that the defendant, William Stone, appeals in this case.

EARLE & WELLS,
Att'ys for Defendant Stone.

Aug. 7th, 1881.

22 THE STATE of SOUTH CAROLINA, *County of Richland:*

In Circuit Court.

THE STATE OF SOUTH CAROLINA, Plaintiff,
against
CORBIN & STONE, Defendants.

The defendant Stone excepts to so much of the ruling of his honor the presiding judge in this cause as held that the court had jurisdiction of the case after this defendant had, as a citizen of New York, filed his petition in the circuit court of the United States to have case transferred to that court.

EARLE & WELLS,
Att'ys for Def't Stone.

Aug. 7th, 1880.

We accept service of this notice of appeal and exceptions, Aug. 24, 1880.

LEROY F. YOUMANS,
Att'y Gen'l State.
J. H. HUDSON,
Presiding Judge.

Aug. 26, 1880.

D. B. MILLER, *C. C. P.*

23 *Exceptions.*

THE STATE OF SOUTH CAROLINA, *County of Richland:*

In the Circuit Court.

THE STATE OF SOUTH CAROLINA, Plaintiff,
against
CORBIN & STONE, Defendants,

Action on money demand.

To his honor the presiding judge and Hon. Leroy F. Youmans:

Please take notice that the defendant, D. T. Corbin, appeals in the

above-stated case on the ground of supposed error in the annexed bill of exceptions, and in the refusal and modification of his prayers for charge as shown by the notes of the court thereon.

EARLE AND WELLS,
Attorneys for Defendant Corbin.

Bill of Exceptions.

THE STATE OF SOUTH CAROLINA, *County of Richland:*

In the Circuit Court.

THE STATE OF SOUTH CAROLINA, Plaintiff,
against
CORBIN AND STONE, Defendants.

Action on money demand.

1. The defendant, D. T. Corbin, moved to have the counter-claim set up in his answer, and not controverted by the reply, as prescribed by section 176 of the Code, for the purpose of the action taken as true under section 191 of the Code. The motion was overruled and the defendant excepted.

2. The defendant Corbin offered testimony tending to show
24 that the State treasurer, S. L. Leaphart, had taken credit for a large portion of the money loaned the State and mentioned in the counter-claim in accounting with and paying off the members of the Legislature of 1876 and 1877. That the State had actually received the money.

The testimony was excluded by the court and defendant excepted.

3. The plaintiff's attorneys moved to strike out the counter-claim set up by the defendant Corbin, on the ground that it was in the nature of an action against the State by the defendant, and that a counter-claim could not be pleaded against the State. The motion to strike out was granted and the court filed a written opinion therein as follows:

THE STATE OF SOUTH CAROLINA, *County of Richland:*

In the Court of Common Pleas.

THE STATE, Plaintiff, *against* CORBIN & STONE, Defendants.

Money Demand.

The only pleadings in this action are the complaint and answer, in the latter of which many defenses are set up, of which several are by way of counter-claim. To this answer there is neither reply nor demurrer.

Upon the reading of the pleadings the defendant's assistant coun- Mr. Akerman, stated that they would move for judgment upon the counter claim, and the attorney general stated that counsel for the State would move to strike out of the answer all matters of defense, except that of a fee to Messrs. Corbin & Stone, as attorneys in the suit against the Carolina Phosphate Co., limited, in which Messrs. Corbin &

Stone had served the State as attorneys, and had recovered for the State the money now sued for. Mr. Wm. E. Earle, leading counsel for defendants, not being present by reason of detention in Charlotte, it was agreed that the evidence should be proceeded with and the motions should be heard on the arrival of Mr. Earle. Accordingly, Mr. Earle having arrived, these motions were made in
25 open court without any notice previous to the trial, the motion for defendants being "that the court do declare the counter-claim admitted," which I construe to be a motion for judgment on these counter-claims. Very elaborate arguments on both sides were made in support of and opposition to the motions respectively. Counsel for the State urge that a counter-claim being a cross-action cannot be set up against the State in a suit like the present, which is for money ($28,000) claimed of defendants by the State.

That the State can neither be sued directly or indirectly by one of her citizens. The defendants' counsel reply by combating this doctrine, and with much force contend that the State, having neither replied nor demurred to the counter-claim, cannot now, in open court and without notice, be admitted to make this motion. Not without serious misgivings as to its correctness, I hold as follows, viz: That if a counter-claim on its face does not show sufficient facts to constitute a cause of action or properly a counter-claim in law, that the objection may be raised at the trial, although the plaintiff had neither replied nor demurred. I hold this in analogy to the rule laid down in section 171 of the Code, where it is enacted that all possible defenses to a complaint must be set up either by answer or by demurrer, except the objection to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action.

If these defenses to a complaint may be interposed orally in open court, then it would seem that they may likewise be thus raised to a counter-claim, which is a cross-complaint against the plaintiff. This is, to say the least of it, a very liberal construction of the law of pleadings as laid down in sections 170, 171, 176, 177, and 191 of the Code. I then hold that the facts set up by way of counter-claim against the State did not constitute a cause of action, and ordered them stricken from the answer, but directed all other matters of defense to be allowed to stand. The weight of authority seems to be that a citizen sued by the State cannot interpose a
26 counter-claim by way of discount and set off against the cause of action—a rule that certainly works great hardship and should be relaxed. To all the above rulings the defendants' counsel duly excepted.

J. H. HUDSON,
Presiding Judge.

July 27, 1880.

True copy, July 29, 1880.
[SEAL.]

D. B. MILLER,
C. C. P.

The defendant, Corbin, excepted to the ruling of the court as expressed in said opinion.

The defendant, D. T. Corbin, submitted the following:

4. Now defendant, D. T. Corbin, by his counsel, and brings to the attention of the court that neither the comptroller general of South Carolina, who directed this suit to be instituted, -or the attorney general of South Carolina, who filed the complaint herein, had or have any authority in law to commence or prosecute the same on the part of the State, and therefore this court has no jurisdiction thereof, and should dismiss the same.

The court overruled the plea, and the defendant excepted.

5. The court instructed the jury that the comptroller general has no authority to make a settlement with Corbin & Stone, they having money of the State in their hands, and having claims against the State, however valid.

Defendant Corbin excepted.

6. The court instructed the jury that if any officer of the State government employ*ing* counsel, such counsel must look for compensation to an appropriation by the General Assembly to pay them.

Defendant Corbin excepted.

7. The court inadvently remarked to the jury that the money of the State comes by the hard earnings of the people, and can only go out by the laws of the land.

To which the defendant excepted.

8. The court charged the jury that to ascertain the amount
27 of the fee in the phosphate case resort must be had to the judgment. If it referred to a fund then collected, there was none, and it cannot be understood that the defendants here were to have no compensation for their services. "It is to be regretted that in the orders, reports, and testimony that language — so indefinite as to leave doubt. The reference is to a fund not then collected, but one to be collected thereafter. But what fund? That I leave as a question for you. Judgment was rendered for 5,984 tons of rock dug up to the commencement [of] suit. The second day after the report judgment was rendered for 22,016 tons of rock dug after the suit was begun. Now was this last a judgment in this suit? What was the suit for? Damages already done. The judgment for 22,016 tons was on this bond. The bond given is peculiar. It is not an injunction bond. It is not a bond in this suit. It was intermediate arrangement to prevent suit. This suit was really for 5,984 tons and an injunction, and this is a fact to be considered in the case. Now, let us see the testimony: According to Mr. Simmons the end was reached; there was no other decree or judgment rendered in the cause except for $3,985. Col. Buist speaks of a result as existing—having been obtained. What sum by decree did Simonton refer to? There was

none, except that for $5,984. McGrath says amount to be paid the State under this decree. There was but one in existence."

To all whereof the defendant, Corbin, excepts.

9. The court charged the jury the decree for 22,016 tons was not a decree in the cause.

To which defendant, Corbin, excepts.

10. The court charged the jury that the 22,016 tons were recovered on the bond and was not in the suit, the bond not being an injunction bond, but an intermediate arrangement to prevent suit.

To which defendant, Corbin, excepts.

11. That at the conclusion of the charge the court inadvertently remarked that if it were necessary in the case he would charge the jury that Dunn was neither *de facto* nor *de jure* comptroller general, but that it was not necessary to the case.

28 To which the defendant, Corbin, excepts.

12. The court submitted to the jury the construction of the order fixing the fee of Corbin and Stone.

To which the defendant, Corbin, excepts.

13. The court charged the jury that as there had been no fund collected in the cause on the 4th day of November, 1875, when the decree for the compensation of Corbin and Stone was made, said decree referred to a sum of money thereafter to be collected in the cause, but the court then left it to the jury to determine upon what sum collected, whether the sum of $5,984 or the sum of $28,000, the percentage of sixty-two and one-half per cent. was to be collected.

The defendant, Corbin, excepts.

And the defendant Corbin moved to set aside the verdict as against the evidence, which motion was refused.

Defendant Corbin excepted.

Exceptions are also taken to the refusals of the prayers for charge in so far as the same were refused or modified. Said prayers and modifications having already been marked and noted by the court will be printed in the brief.

The foregoing exceptions are respectfully submitted to the court for its allowance.

EARLE & WELLS,
Att'ys for Def't Corbin.

We accept service hereof. Aug. 9th, 1880.

LEROY F. YOUMANS,
Att'y Gen'l, for Pl'ff.

J. H. HUDSON,
Presiding Judge.

D. B. MILLER, *C. C. P.*

29 THE STATE OF SOUTH CAROLINA, *Richland County*.

In the Common Pleas.

THE STATE OF SOUTH CAROLINA, Plaintiff,

vs.

D. T. CORBIN and WILLIAM STONE, Copartners under the name and firm of Corbin & Stone, Defendants.

The plaintiff, complaining of the defendant-, alleges that the—

I. Defendants were, at the time hereinafter mentioned, attorneys-at-law, duly admitted to practice as such in the courts of the State of South Carolina, and copartners for the practice of law, under the name of Corbin & Stone.

II. That, on or about the 5th day of July, 1874, the State of South Carolina instituted a suit in the court of common pleas for the county of Beaufort against the South Carolina Phosphate Company, limited, otherwise known as the Oak Point Mines; that D. T. Corbin and William Stone, copartners as aforesaid, were associated with the Hon. S. W. Melton, as attorneys and counsel for the State; that judgment was given in said suit for the State, and the defendant in said proceeding did, on or about the 11th day of November, 1875, pay to the said Corbin & Stone, as attorneys and counsel for the State, the sum of twenty-eight thousand ($28,000) dollars in satisfaction of said judgment, and the said Corbin & Stone received the said sum of twenty-eight thousand ($28,000) dollars as attorneys and counsel of the plaintiff, and to the use of the plaintiff.

III. That the sum of three thousand seven hundred and forty ($3,740) dollars was due and payable out of the said twenty-eight thousand ($28,000) dollars to the said Corbin & Stone as counsel fee in said cause; that the balance remaining after the deduction of said fee, to wit, twenty-four thousand two hundred and sixty ($24,260) dollars, was and is the money of the plaintiff, and was due and payable by the said Corbin & Stone to the plaintiff, and the plaintiff has demanded payment of the same from the said Corbin & Stone.

IV. That the said Corbin & Stone have not paid to the plaintiff any portion of the said sum, except the sum of two hundred and six dollars and six cents ($206.06), but refuse so to do.

Wherefore the plaintiff demands judgment against the said Corbin & Stone for the sum of twenty-four thousand and fifty-three dollars and ninety-four cents, with interest from the 11th day of November, 1875, and costs.

THE STATE OF SOUTH CAROLINA, *Richland County:*

Personally appeared before me Johnson Haygood, who, being duly sworn, says that he is comptroller general of South Carolina; that from information received by him in his official capacity, he saith: That the State of South Carolina, in or about the fifth day of February, 1874, did institute proceedings in the court of common pleas for Beaufort county by information in the name of Hon. S. W. Melton,

attorney general, against the South Carolina Phosphate Company, limited, a corporation in and of Great Britain, but doing business in South Carolina, and commonly known as the Oak Point Mines, for intruding upon the rights and property of the State by digging, mining, and removing from the beds of the navigable streams and waters of the State phosphate rock and phosphate deposits, and converting the same to its own use: to recover the value of the phosphate rock so mined and converted, and to perpetually enjoin said company from mining and removing such phosphate rock from the beds of the navigable streams and waters of the State.

31. That David T. Corbin and William Stone, attorneys, solicitors, and counsellors-at-law, copartners under the name of Corbin & Stone, were associated with the Hon. S. W. Melton as counsel for the State. That judgment was given for the State in the said proceeding, and the defendants, by orders of the said court of common pleas for Beaufort county, did pay to the said Corbin & Stone, counsel for the State, the sum of five thousand nine hundred and eighty-four ($5,984) dollars, and also the sum of twenty-two thousand and sixteen ($22,016) dollars—in all the sum of twenty eight thousand ($28,000) dollars, in satisfaction of said judgment. That under the orders of the said court the said Corbin & Stone were authorized to retain from the amount so received by them from the defendant the sum of three thousand seven hundred and forty ($3,740) dollars for their counsel fee in said case. That the balance remaining after deducting the said fee was twenty-four thousand two hundred and sixty ($24,260) dollars, belonging to the said State; but that the said Corbin & Stone have not paid over the said sum of twenty-four thousand two hundred and sixty ($24,260) dollars, nor any part thereof, to the State or any officer thereof authorized to receive the same, although demand has been made upon them therefor.

That an action has been commenced by the State of South Carolina against the said Corbin & Stone to recover the said money; and deponent prays that the said defendants may be arrested in said action under the provisions of the Code of Precedure.

JOHNSON HAGOOD,
Comptroller General S. C.

Sworn to before me this 1st August, 1877.

WADE H. MANNING, [L. S.]
Notary Public.

32 STATE OF SOUTH CAROLINA, *County of Richland:*

Court of Common Pleas.

THE STATE OF SOUTH CAROLINA
against
D. T. CORBIN and WILLIAM STONE, Copartners under the name and firm of Corbin and Stone.

The State of South Carolina to the sheriff of the county of Greenville, Greeting:

You are hereby required forthwith to arrest David T. Corbin and

William Stone, the defendants in the above-entitled action, if they or either of them can be found within your county, and to hold them or either of them so arrested by you to bail in the sum of fifty thousand dollars, and to return this order to James Conner, attorney general, at his office in Columbia, on the 4th day of September, A. D. 1877.

[SEAL.] D. B. MILLER,
C. C. P. & G. L.

STATE OF SOUTH CAROLINA, *Richland County:*

I, D. B. Miller, clerk of the court of common pleas for said county, in said State, do certify that the foregoing four pages contains a true copy of the affidavit and order of arrest in the case of the State of South Carolina against Corbin & Stone, as will appear by reference to the orignal thereof remaining on file in my office.

Given under my hand and the seal of the said court, at Columbia, this 28th day of December, 1878.

[SEAL.] D. B. MILLER, *C. C. P.*

33 CHARLESTON, 14 *Jan.*, 81.

W. E. Earle, Esq., Arlington Insurance Co. Building, 1505 Penn. Ave., Washington, D. C.

DEAR SIR: I have just received yours of 7th inst. in relation to the brief in the case of State *vs.* Corbin and Stone, and have enclosed it to Attorney General Youmans and urged him to attend to the matter at once, and offering him aid in making up the brief as you desire.

I did have a conference with him when in Columbia, as I promised; we went over all the papers, but did not see the papers which you had submitted to him.

I will be glad to expedite the preparation of the case as much as is in my power.

Yours truly. CH. RICHARDSON MILES.

THE STATE OF SOUTH CAROLINA *against* CORBIN & STONE.

GREENVILLE, S. C., *April* 12, 1881.

To Hon. Leroy F. Youmans, attorney general, Columbia, S. C.

DEAR SIR: I have to-day placed the brief in this case in the hands of the printer. You will remember that though I served my proposed case promptly, I have never had any amendments proposed. When I spoke to you about it in December you said you would see Mr. Miles and let me hear from you soon. Not hearing, I subsequently wrote to you and also to Mr. Miles. In reply to my letter he informed me that you and he had found the case and had an interview, but had not decided on your course. Since then I have
34 written to you two other letters, but have received no reply.

I dare say, however, that if there is anything specially you wish printed, we may agree on it if you will let know here at once.

Will you wish to argue the appeal at the approaching term?

I am much obliged for your telegram as to the Kane case, and shall remember your consideration.

Yours, truly, WM. E. EARLE.

Registered return receipt sent April 13th, 1881. Reg. No. 13 from post office at Greenville, S. C. Reg. letter addressed to Hon. Leroy F. Youmans, attorney general, Columbia, S. C. Received the above-described registered letter.

LEROY F. YOUMANS.
JOHN H. LEE.

STATE *vs.* COBBIN & STONE.

EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL,
COLUMBIA, S. C., *May* 6, 1881.

W. E. EARLE, Esq., Washington, D. C.:

I have not been able to find the papers you sent me in appeal in these cases. Do send at once your printed brief, the MSS. of what you had sent to the printer. I wish to try at this term, but, in consequence of the celebration of the centennial anniversary of the battle of the Cowpens occurring during the time assigned for hearing the appeals from fifth circuit, the court has just passed an order under which we can have the hearing on the first Monday in June, the court taking up the cases of fifth circuit, passed over, on that day, and agreeing to sit till the following Saturday if necessary. This, I take it, will suit you, as the eighth circuit is to be heard immediately before. Do let me hear from you at once.

Yours, truly, LEROY F. YOUMANS,
Attorney General.

Duplicate sent you at Greenville, S. C.

1505 PENNSYLVANIA AVENUE,
WASHINGTON, D. C., *May* 9, 1881.

Hon. Leroy F. Youmans, Attorney General.

MY DEAR SIR: Your favor of the 6th is just hand. Really it is impossible for me now to try this case at the time you indicate, for not hearing from you in reply to my letter of the 12th of April (and from previous ones) I have accepted engagements here which will occupy me closely until July, and have made arrangements as to my cases from the eighth circuit, including some very important ones. Up to the 2d inst. it would have suited me admirably to try at this term, and the time you suggest would have been most desirable. Now, however, it would subject me to such personal inconvenience as I am sure you would not think of, and I do not feel that I am derelict; but I am sure that, under the circumstances, you will not be inclined to press me. I could not get the brief printed in G. so as to read the proof before leaving, so brought it back here, and will send you copies in a few days. It is quite voluminous, as

it embraces both answers under our agreement in December to regard both appeals as one case. If there is still anything you wish put in let me know immediately.

I am yours, very truly, WM. E. EARLE.

36 *The Separate Answer of D. T. Corbin.*

THE STATE OF SOUTH CAROLINA, *Richland County:*

In the Court of Common Pleas.

THE STATE OF SOUTH CAROLINA, Plaintiff,

vs.

D. T. CORBIN and WILLIAM STONE, Copartners under the name and firm of Corbin & Stone, Defendants.

David T. Corbin, of the late firm of Corbin & Stone, defendants named in the above-entitled cause, for himself answering the plaintiff's complaint, says:

1. That as to the allegations of the first paragraph of the complaint, relative to the copartnership existing between himself and William Stone for the purpose of practicing law, and their admission to practice law in courts of the State, he admits the same to be true. But he further says that said copartnership was dissolved some time in September, A. D. 1877, when his late partner, William Stone, removed from the State of South Carolina to the State of New York.

2. That as to the allegations contained in the second paragraph of the complaint he denies the same to be true, except as hereinafter stated, viz:

That on the 29th day of October, A. D. 1873, the State of South Carolina instituted a suit in the circuit court in the common pleas for Beaufort county against The South Carolina Phosphate Company, limited, otherwise known as The Oak Point Mines.

37 That this defendant and William Stone, then copartners in the practice of law, and doing business at Charleston, were employed by the then attorney general of the State, Hon. Samuel W. Melton, to bring said suit and conduct the same to conclusion. That a judgment and decree was recovered in said suit for the State after more than two years' litigation, and the defendant in said suit, pursuant to the final judgment and decree therein (entered up November 11, 1875), some time in November and December, 1875, and January, February, and March, 1876, at different times and in different amounts, paid to this defendant and his copartner, William Stone, the aggregate sum of twenty-eight thousand dollars ($28,000.00), principal sum, and two hundred and thirty-five dollars and seven cents ($235,07) as costs of suit for the use of the State; total amount, twenty-eight thousand two hundred and thirty-five $\frac{7}{100}$ dollars.

3. That as to the allegations contained in the third paragraph of the complaint this defendant denies the same, except as to the demand for money as therein alleged, which this defendant admits to be true.

4. That as to the allegations contained in the fourth paragraph of the complaint this defendant, as to himself, admits the same to be true.

5. This defendant denies that any interest is due upon the alleged claim of plaintiff.

For a defence to this action this defendant says:

That some time in October or November, A. D. 1873, the precise date this defendant cannot now state, the law firm of Corbin & Stone, defendants named in this action, then doing business at Charleston, South Carolina, were employed by the attorney general of South Carolina, Hon. Samuel W. Melton, to commence and conduct, on behalf of the State of South Carolina, a suit against the South Carolina Phosphate Company, limited, *alias* The Oak Point Mines.

38 Pursuant to said employment, said Corbin & Stone examined the questions involved in the proposed suit, determined the form of procedure, prepared an information or complaint, and summons against said company, and submitted the same to the attorney general for his official signature, which was affixed. The summons is dated October 29th, 1873, and the same was duly served upon the defendant company. The course of action, the proceedings and orders taken, the judgment recovered, and the allowance of compensation for professional services to D. T. Corbin and William Stone were and are substantially as follows:

The South Carolina Phosphate Company was mining and removing from the bed of North Wimbee creek the phosphate rock, and claimed the right to do so on the ground of riparian proprietorship and the non-navigability of said creek. The State, on the contrary, claimed that the phosphate mine or deposit was the property of the State, and on the ground that North Wimbee creek was a public, navigable stream, within the ebb and flow of the tide; that the soil, and consequently all mines therein, in such a stream, was the property of the State. The real point of the controversy was as to the title to the phosphate deposit in the bed of said creek. The proceedings taken to determine this question were the natural and necessary ones, and in accordance with the facts stated. The information on behalf of the State was filed in said circuit court for Beaufort county against said company, alleging (1) that said company had intruded upon the property of the State by mining and removing from the bed of said stream 15,000 tons of phosphate rock, of the value of $90,000. (2) That said company was engaged and intended to continue the business of mining and removing phosphate rock from the bed of North Wimbee creek without permission from the State. The information prayed judgment against said company for $90,000 and a perpetual injunction restraining said company from mining and removing the phosphate rock from the bed of said

39 stream. At the same time the summons and complaint were served on the defendants there was served notice of a motion for a preliminary injunction to restrain said company from mining and removing said phosphate rock in said stream pending the litigation. This motion was a proper one; but in reply to it the de-

fendant showed that the business had been going on two or three years, and that a large amount of capital was invested and a great injury would result from stoppage, and offered to secure the State from all damage if allowed to proceed with mining operations, in the event of its being determined ultimately that the company had not good right and title to mine, etc.

The matter was submitted to the court, and an order taken accordingly, allowing the company to proceed with its mining operations, but requiring the execution of a bond in the sum of ($50,000) fifty thousand dollars, to save the State harmless therefrom, and directing that said bond be filed of record in the cause with the clerk of court subject to the order of the court. This bond was duly executed by the company and filed as required, and the mining operations of the company proceeded as usual. The cause proceeded. It was referred to Asher D. Cohen as referee, to report generally, and to report any special matter. In June, 1874, the referee reported. This report is in substance that the State, by an act of March 1, 1870, had given certain persons named, and such persons as they should associate with them, the right, on certain conditions, to mine and remove phosphate rock from the beds of the navigable streams of the State. That those parties had complied with the conditions of the act, and on the 14th day of March, 1870, had associated the defendant company in this case with themselves in the privileges of said act, with the right to defendant company to mine and remove the phosphate rock within certain boundaries in North and South Wimbee creek, upon the terms and conditions of said act. The defendants, however, had been careful in said instrument of association to assert that they had the right to mine the phosphate rock by virtue of riparian proprietorship. That they asserted the same now, because the creeks were not navigable streams, but, if found navigable, the company claimed the protection of its said association with the grantees, under the act of March, 1870.

The referee further reported that the defendant company claimed if North Wimbee creek was navigable their riparian and proprietary rights extended to low-water mark, and he reported that the defendant company had dug, mined, and removed from the bed of North Wimbee creek, within the boundary lines mentioned below usual low-water mark, 5,984 tons of phosphate rock, and there was due the State on said rock $5,984 if said creek was a navigable stream. The referee further reported that said company had dug, mined, and removed from the bed of said streams, between usual high and low-water marks, 4,237 tons of phosphate rock.

That if by virtue of riparian proprietorship the defendant company had a right to dig this rock, then nothing was due the State on account of it; but if it had no such right, then there was due the State on account of it the sum of $4,237. The referee finally reported for the determination of a jury, under the direction of the court, the question: "Is North Wimbee creek a navigable stream?" This report was adopted by the court only in part, viz., as to the facts found, and it was again referred to the referee to report upon the

remaining questions of fact. This reference involved the ascertainment of the facts relative to North Wimbee creek—which, in law, made or did not make it a navigable stream. These references ran through many months, and resulted in a voluminous report with the testimony. The facts ascertained from the report and testimony being fully argued before the court, upon consideration thereof the court held: (1) "that North Wimbee creek was a public, navigable stream;" (2) that the defendant company had good title to the land therein between usual high and low water mark; and (3) the State had title to the bed of said creek below usual low-water mark, and that the State was entitled to a judgment in conformity to
41 this decision. This opinion having been rendered on July 12, 1875, a decree was entered that the defendant do pay the plaintiff the sum of $5,984, as per report, and that plaintiff do have execution therefor. It was further ordered that the defendant company be restrained from mining the phosphate rock from that part of the bed of North Wimbee creek opposite to and adjoining the lands of the defendant and the centre of said stream, below usual low-water mark, until said defendant company shall file in the office of the comptroller general of the State a bond in the penal sum of $50,000, conditioned and approved and renewable according to the provisions of section 3 of the act of March 1, 1870.

On the same day that this order was granted, July 12, 1875, another order was granted for the purpose of ascertaining the amount of phosphate rock that had been mined by the company pending the litigation, and for which a bond had been required by the court, and given by the defendant. The order is as follows: "The defendant in the above-entitled cause having executed its bond in the penal sum of $50,000, conditioned to pay royalty, etc., if, in the ultimate determination of said cause, they shall be bound to do so, and said bond having been filed in this court, it is ordered that it be referred to Asher D. Cohen, etc., to hear and determine how many tons of phosphate rock have been dug, mined, and removed from the bed of North Wimbee creek, below usual low-water mark, by the defendant company, in addition to the 5,984 tons of phosphate rock reported cleared October 1, 1873; also to determine and report the amount of royalty in money due by the defendant to the plaintiff on account of said phosphate rock so dug, mined, and removed." Under this order the references proceeded some time in October, 1875. The defendant company gave notice of an appeal to the Supreme Court, November term, 1875, from the decree of Judge Maher, of July 12, 1875, and hence all further proceedings under that decree for the collection of the money due thereunder were stayed. It was intimated some time in October by defendant's counsel that
42 the defendant had determined not to press the appeal. There being a term of the court in session at Beaufort, where the cause was pending and about to adjourn, upon the suggestion of the attorney general an order was taken referring it to Asher D. Cohen "to determine and report what per cent. of the fund collected in the above-entitled cause would be proper compensation to be paid to Messrs.

Corbin & Stone for their professional services therein." This order was dated October 16, 1875.

At this time there had been no "fund collected in the above-entitled cause," and hence nobody had or could have any reference to such a fund, but the fund to be collected. On the other hand there have been two distinct funds provided for by orders of the court, four months before, one for rock dug below usual low-water mark prior to proceedings in the cause, and the other for rock dug in same place pending proceedings in the cause. The first was ascertained in amount, but stayed in payment by appeal; the second was at reference to fixed amount. The referee in his report, under the order of October 16, 1875, says, after stating some of the considerations that govern him in his conclusions, "In the recommendation, hereinafter made, I have looked beyond the mere money decree that will be entered up against the defendant. This is one of the results of success, but, in my opinion, the smallest; the other and greater benefits are in the creation of a continuous annual income to the State, and in the establishment of a precedent by which future litigation in similar causes will be prevented. Two of the witnesses, Messrs. Simons and Buist, are of opinion that 75 per cent. of the amount received would be a fair and reasonable compensation. The other two, Messrs. Magrath and Simonton, that the plaintiff's counsel should be allowed 50 per cent. of the amount to be paid to the State under the decree, exclusive of the expenditures which they may have been called upon to make in the conduct of the case. After a careful consideration I find and recommend that 62½ per cent. of the fund collected in this case would be a proper com-
43 pensation to be paid to Messrs. Corbin & Stone for their professional services therein. This to be exclusive of disbursements as set out in their statement submitted to me, amounting to $325.50." This report is dated October 28, 1875, and was submitted to the court on November 14, 1875. Whereupon it was ordered, "that said report be confirmed and stand as the judgment of the court." That at the time this report was made and at the time it was confirmed there had been no money collected in the cause. The report in terms recognizes this fact, and the judgment of the court, adopting the report as its judgment, recognizes it, the words of said report being: "In the recommendation, hereinafter made, I have looked beyond the mere money decree that will be entered up against the defendant," viz., to final decree to be entered up fixing the amount of the defendant company's liability.

On November 9, 1875, the referee made the final report, under the order of reference of July 12, 1875. This report says: "That 22,016 tons is the amount which the defendants have dug, mined, and shipped, and have on hand from the 1st of October, A. D. 1873, to October 1, 1875, taken from below usual low-water mark. * * * This 22,016 tons is in addition to the 5,984 tons heretofore reported cleared to October 1, 1873. * * * I also determine and report that the amount of money due from the defendant to the plaintiff on account of said phosphate rock so dug, mined, and removed is $22,016. On the 11th of November, 1875, this report was submitted

to the court and confirmed, and ordered to stand for the judgment and decree of the court. And it is further ordered that defendant pay to Corbin & Stone, counsel for plaintiff, the sum of $22,016, the amount stated in the report to be owing by defendant from October 1, 1873, to October 1, 1875, and that upon the payment of the same and of the further sum of $5,984, the amount heretofore adjudged to be owing by the defendants, (which last payment the defendants are hereby authorized to make to Messrs. Corbin & Stone), the defendants be dis-
44 charged and released from all further account and liability for claims in this cause to the 1st of October, A. D. 1875. This is the final decree which, for the first time, determined the amount of money to be "collected in the cause," and is the decree to which the referee's report on compensation to be paid to Corbin & Stone clearly pointed.

The comptroller general of South Carolina, Thomas C. Dunn, at first held that this allowance of sixty-two and a half per cent. of the fund collected in the cause for the professional services of Corbin & Stone applied only to a portion of the fund collected in the cause, to wit: Five thousand nine hundred and eighty-four dollars ($5,984), and not to the whole fund collected ($28,235,07). But upon a full investigation and discussion of the matter he abandoned said position and yielded to the construction and application of said decree above stated and set forth as the correct and necessary one. He so informed said Corbin & Stone in a letter of Feb. 10, 1877.

The extract from said letter is as follows: "On reflection and advice I have to inform you that I abandon the claim heretofore made on you on account of my construction of the decree for compensation, and yield to your construction of that decree of the court in that behalf."

(The whole correspondence is ready to be produced.)

The fund collected in the cause, as before stated, was twenty-eight thousand two hundred and thirty five dollars and seven cents ($28,235.07). Sixty-two and one-half (62½) per cent. of this sum is seventeen thousand six hundred and forty-six dollars and ninety-one cents ($17,646.91), to which add the sum of three hundred and twenty-five dollars and fifty cents ($325.50), disbursements made by Corbin & Stone in the cause, and it gives the aggregate sum of seventeen thousand nine hundred and seventy-two dollars and forty-one cents ($17,972.41), as the amount allowed Corbin & Stone as compensation for their professional services and disbursements in the said cause. This amount, by order of the court, they were authorized to retain out of the fund collected by them in the cause.
45. This being done there remained in their hands, to be accounted for to the State, the sum of ten thousand two hundred and sixty-two dollars and sixty-six cents ($10,262.66).

For the said sum of $10,262.66 this defendant and said William Stone have duly accounted to the State as follows:

Some time in February A. D. 1875, they were employed by the comptroller general of the State of South Carolina, then Hon. Solomon L. Hoge, to institute the necessary proceedings in his name, as representing the State, to obtain possession of the railroad and ap-

purtenances of the Savannah and Charleston Railroad Company, under the provisions of an act entitled "An act to enable the Savannah and Charleston Railroad Company to complete their road," ratified on the 2nd day of March A. D. 1869. No agreement was made at the time between said comptroller general and said Corbin & Stone as to the amount of compensation to be paid them for the services to be rendered, except as to the retaining fee, which was fixed at one thousand dollars.

It was understood that a reasonable compensation should be paid for such advice and services as were rendered in the conduct of the cause. The attorney general of South Carolina, then Hon. Samuel W. Melton, subsequently, on the 27th of March, A. D. 1875, gave his official sanction to the proceedings in the cause, and in writing authorized said Corbin & Stone, if necessary, to represent him officially therein.

The preliminary proceedings in the cause were taken by Corbin & Stone on the 24th day of February, A. D. 1875, by preparing and serving on the president and receiver of the R. R. Company, C. T. Mitchell, a written demand for the possession of the railroad and appurtenances of said R. R. Company. This demand was refused by him.

Thereupon, on the first day of March, A. D. 1876, a petition was prepared and filed in the circuit court in the common pleas
46 for Charleston county, signed by the comptroller general, in the cause entitled Daniel Hand, plaintiff, *vs.* The Savannah and Charleston R. R. Company *et al.* (in which cause said Mitchell had been appointed receiver), which petition, after reciting the statute and grounds therefor, prayed in substance that said Mitchell should be directed by the court to deliver the possession of said Savannah and Charleston railroad, with its appurtenances, to him, said Solomon L. Hoge, as comptroller general of the State.

On the filing of said petition it was ordered by the court that said Charles T. Mitchell do show cause on the 5th of March, A. D. 1875, why the prayer of the petition should not be granted.

The said Charles T. Mitchell, in response to said rule, showed numerous and various causes against the same, as also did Daniel Hand.

The said cause being at issue came on to be heard before the court on the 2d day of April, A. D. 1875, when, after full and elaborate argument made by Corbin & Stone on behalf of the petition, and by Hon. J. B. Campbell, Hon. Henry Buist, and other distinguished counsel on behalf of the respondent, it was "ordered and adjudged that the petition be dismissed and the prayer thereof be refused, and the rule discharged."

Thereupon, on the 5th day of April, 1875, the petitioner (now Thomas C. Dunn, comptroller general of the State, in place of Solomon L. Hoge, resigned) gave notice of appeal to the supreme court from the said order and decree of April 2d, 1875.

Thereupon the case was duly prepared by Corbin & Stone on behalf of the petitioner for a hearing in the supreme court. The record was made up and duly certified and printed and filed in that

court, and a legal argument was duly prepared and printed for that court.

Some time in May following the said cause was fully argued by Corbin & Stone on behalf of the comptroller general before the supreme court at Columbia, South Carolina.

47 On the 5th day of June, A. D. 1875, the supreme court announced its opinion and reversed the judgment of the circuit court, dismissing the petition, and "ordered and adjudged that Thomas C. Dunn, comptroller general of the State, is authorized to take possession of the said Savannah and Charleston railroad, with all its appurtenances," &c.

This decision was sent down to the circuit court of Charleston county for such orders as might be necessary to give it effect.

On June 14th, 1875, due notice thereof having been given and preparation made, argument was made by Corbin & Stone in the circuit court for Charleston county upon motion to enforce the said decree of the supreme court of June 5th, 1875.

This motion was refused by the court, because at the hearing the attorney for Daniel Hand showed that a writ of error had been granted to have the decision of June 5th, 1875, reviewed by the Supreme Court of the United States, which writ, it was claimed, stayed further proceedings here until the determination of said Court upon said writ of error.

From this decision an appeal to the supreme court of the State was taken July 2d, 1875, and a motion was made and argued by Corbin & Stone in said supreme court at Columbia, South Carolina, July 15th, 1875, to docket and have heard said appeal.

This motion was granted by the court and the cause entered on the docket, and the same came on and was argued by the said Corbin & Stone at Columbia, July 23d, 1875. Printed arguments were duly submitted.

At the same time, previous notice having been given and preparation made, proceedings for contempt against C. T. Mitchell and the advisory board of the Sanannah and Charleston Railroad Company were submitted and argued by said Corbin & Stone.

Further proceedings in the cause were thenceforth removed
48 to the United States Supreme Court at Washington. Due notice of a motion to dismiss the writ here filed for want of jurisdiction was given by Corbin & Stone, and an elaborate printed argument was made and submitted by them on the 15th of November, 1875.

The waiting for the call of the cause and presentation of this argument involved three weeks' time in Washington.

On January 4th, 1876, a further printed argument in reply to argument in behalf of Daniel Hand was submitted to the United States Supreme Court by Corbin & Stone.

The United States Supreme Court declined to dismiss the appeal for want of jurisdiction then, but reserved the question for determination on the final argument of the cause.

Thereupon notice of a motion to advance the cause upon the

docket of the United States Supreme Court was given. This motion came on to be heard April 3d, 1876.

An elaborate statement of the pecuniary liability of the State on account of the Savannah and Charleston railroad, of the condition of the railroad and its debts and its management, was prepared in the form of an affidavit, sworn to by William C. Courtney, and also a printed argument was prepared by Corbin & Stone, and the same submitted to the court. The court, contrary to reasonable expectation, declined to advance the cause. Said Corbin & Stone, in the conduct and management of said cause, and as to all proceedings in the supreme court of South Carolina, and in the Supreme Court of the United States, were in constant communication and consultation with Hon. Thomas C. Dunn, comptroller general of South Carolina, and they acted under his instructions. He required every and constant effort to be made that was in any way likely to result in the early removal of the obstacles to the taking of possession by him of the said Savannah and Charleston railroad.

After it was finally ascertained that said cause would have to stand upon the docket of the United States Supreme Court for two or three years to be heard on its merits when reached there in the
49 regular order of business, these defendants submitted their account for professional services rendered and disbursements made in said cause to Hon. Thomas C. Dunn, comptroller general of South Carolina, for approval and payment, and especially asked that their said claim and account of said services and disbursements should be allowed them in set-off against moneys in their hands collected by them in the suit of the State against The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines. An extract from a letter of D. T. Corbin, of June 17th, 1876, to Hon. Thomas C. Dunn, comptroller general, claiming this set-off, is appended and made part of this answer.

Also a copy of the account of Corbin & Stone for professional services rendered and disbursements made by them in said cause, as finally submitted to Hon. Thomas C. Dunn, comptroller general of South Carolina, together with a letter of advice of Corbin & Stone, dated February 1, 1877, is appended and made a part of this answer.

The comptroller general, Hon. Thomas C. Dunn, replying to this letter of June 17th, 1876, and this letter of February 1, 1877, in a letter to Corbin & Stone, dated February 10th, A. D. 1877, said:

"As to your claim for professional services rendered in the case of comptroller general of South Carolina against the Savannah and Charleston Railroad Company, I think you are justly entitled to the same, and your account submitted is approved by me.

"This approval is given with the understanding that you shall conduct the suit to conclusion in the United States Supreme Court without further charge in that behalf."

The said cause is still pending in the United States Supreme Court, is No. 201 on the docket of the present term, and the said Corbin & Stone have prepared and filed printed argument therein, and are

ready and willing to deliver the same orally when the cause is reached.

This allowance of the said account of Corbin & Stone for $10,056.60 being made, the said comptroller general subse-
50 quently duly and formally settled with Corbin & Stone, and allowed them said account in set-off against the claim of the State on the moneys in their hands, collected in the suit against The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines, and he certified the said settlement and the balance due thereon to the State from Corbin & Stone to the State treasurer, as follows:

"STATE OF SOUTH CAROLINA,
"OFFICE OF THE COMPTROLLER GENERAL,
"COLUMBIA, *March* 8, 1877.

"Hon. F. L. Cardozo, State Treasurer.

"SIR: By the settlement this day made by Messrs. Corbin & Stone in the case of the Oak Point Mining Company, they are indebted to the State of South Carolina a balance amounting to two hundred and six $\frac{6}{100}$ dollars, which amount you will please collect from them.

"Respectfully,
"(Signed) THOM. C. DUNN,
"*Comp. Gen.*"

That subsequently to the said settlement and the receipt of the certificate thereof, the said Corbin & Stone did pay to the treasurer of the State of South Carolina (then S. L. Leaphart) the said balance due the State of two hundred and six dollars and six cents ($206.06), and received his receipt therefor, and this defendant now holds the same ready to be produced in this cause.

This defendant says that said Corbin & Stone fully and duly accounted with the proper officers of the State of South Carolina, the comptroller general and the State Treasurer thereof, for all the moneys collected and received by them for the use of the State in the case of State of South Carolina *vs.* The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines.

51 That said accounting was equitable, just, and legal, and the settlement made was such as, in law, said officers were authorized to make, and the same is binding and conclusive both upon the state of South Carolina and upon this defendant, and upon Corbin & Stone, as to all matters embraced therein; and the said plaintiff and present comptroller general of South Carolina, Johnson Hagood, and the present attorney general, Leroy F. Youmans, and all other officers of the State government of South Carolina, are, in law, estopped from demanding, having, or receiving from said Corbin & Stone, or either of them, any further sum or sums of money or any further accounting, in the matter of moneys collected by them (Corbin & Stone) in the suit entitled The State of South Carolina against The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines.

This defendant further says, on information and belief, that the plaintiff through its Legislative Department, has neglected and refused, and still does neglect and refuse, to make any appropriation or provision whatever for the payment to said firm of Corbin & Stone of their accounts for professional services rendered and moneys by said firm laid out and expended at the request of the plaintiff in the said suit and proceedings against the South Carolina Phosphate Company, limited, otherwise known as the Oak Point Mines, and for the possession of the property of the said Savannah and Charleston Railroad Company. That the moneys received by said firm of Corbin & Stone, as aforesaid were not moneys specifically appropriated by law to the payment of particular claims against the State, and that the same were properly applicable to the payment of the said claims of said firm.

That the said plaintiff has made no provision by which this defendant and his codefendant, Wm. Stone, can sue it for the amount due them, and that they would have been remediless in the premises had they not retained out of moneys of plaintiff in their hands the amounts admitted by the plaintiff, through its proper accounting officers, to be justly due and owing to them.

52 And this defendant, by way of set-off and counter-claim, says:

That the State of South Carolina was at the time of the commencement of this suit, and now is, indebted to him and his late copartner, Wm. Stone, in the sum of seventeen thousand nine hundred and seventy-two dollars and forty-one cents ($17,972.41), for services rendered as attorneys in the case of State *vs.* The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines—the same being sixty-two and one-half per cent. (62½) of the amount ($28,235.07) collected in the cause, and by the court of Beaufort county adjudged to be proper compensation for the professional services of said Corbin & Stone in said cause; also indebted to him and his late copartner, William Stone, in the further sum of ten thousand and fifty-six dollars and sixty cents ($10,056.60) for professional services rendered in the cause of comptroller general of South Carolina, petition *in re* Daniel Hand *vs.* The Savannah and Charleston Railroad Company, at the special instance and request of said comptroller general. That the circumstances under which said services were rendered, the services themselves, and the itemized account thereof are above set forth, and the same is here referred to for full particulars. Also, the plaintiff is further indebted to this defendant and his late copartner, Wm. Stone, in the further sum of two hundred and six dollars and six cents ($206.06) for money paid and delivered by them to S. L. Leaphart, State treasurer, on the 9th day of June, A. D. 1877.

And this defendant demands judgment for said several sums of $17,972.41, $10,056.60, and $206.06, amounting to $28,235.07, against the plaintiff, and that the same be allowed as a counter-claim and set-off against the demands of the plaintiff in this cause.

And this defendant, by way of further counter-claim and set-off against the plaintiff, says that the plaintiff was, prior to the

53 time of the commencement of this action, to wit, on or about the 9th day of January, 1877, justly indebted to him and his late copartner, William Stone, in the sum of eight hundred dollars for professional service rendered the planitiff at the special instance and request of Hon. R. B. Elliott, attorney general of the State of South Carolina.

That said Elliott, attorney general, to make compensation for said services to said Corbin & Stone, made requisition for said amount on the Hon. Thom. C. Dunn, comptroller general of South Carolina, who in response thereto drew two several warrants therefor in favor of this defendant upon F. L. Cardozo, State treasurer. One of said warrants is for three hundred dollars and the other for five hundred dollars. They are both dated the 9th day of January, A. D. 1877. The said warrants were duly presented to the State treasurer, F. L. Cardozo, for payment, and payment thereof was refused by him on the ground that he had no funds with which to pay the same.

That the said William Stone, for a valuable consideration and in settlement of certain accounts between this defendant and himself, has assigned to this defendant his interest in the said warrants, and this defendant now owns and holds the same as his individual property.

That said warrants are due and unpaid, and this defendant demands judgment therefor against the plaintiff.

And this defendant, by way of further counter-claim and set-off against the plaintiff, says:

That the plaintiff was at the time of the commencement of this action, and now is, justly indebted to this defendant in the further full and just sum of eighteen thousand seven hundred and seventy dollars ($18,770) for money loaned the plaintiff through F. L. Cardozo, State treasurer.

That on or about the 20th day of December, A. D. 1877, this defendant, at the special request of said F. L. Cardozo, then State treasurer of South Carolina, and in possession of said office,

54 and in the exercise of the duties thereof, delivered to him, said Cardozo, by way of loan for the use of the State, the said sum of eighteen thousand seven hundred and seventy dollars.

That said F. L. Cardozo, State treasurer, then promised and agreed with this defendant that said money loaned should be used only to meet the immediate and pressing wants of the State government, and that the same should be repaid to this defendant out of the first moneys thereafter received at the State treasury from the collection of taxes.

That the taxes then referred to were the taxes due and collectible in January and February following. That said F. L. Cardozo, treasurer, used said money so loaned and received from this defendant, as this defendant is informed and believes, in payment of part of the regular salaries of the members of the General Assembly and to pay for stationery for the General Assembly and the regular salary of the president of the senate.

That sixty-nine members of the house of representatives received fourteen thousand and three hundred dollars of said money, and the

president and eighteen members of the senate of South Carolina received three thousand and eight hundred dollars of said money, and six hundred and seventy dollars thereof was paid out for stationery for the use of the house of representatives.

And this defendant says:

That the Hon. F. L. Cardozo, State treasurer, for the better security of this defendant, on account of said loan, turned over and delivered to this defendant the pay certificates for the part of their salaries paid of said sixty-nine members of the house of representatives, and of said eighteen members of the senate, and of said president of the Senate, and a warrant of Hon. Thomas C. Dunn, comptroller general of South Carolina, dated December 7th, 1876, for six hundred and seventy dollars, drawn to the order of O. E. Jones, clerk of the house of representatives, on the State treasurer,
55 with direction to "charge to stationery for members of the house of representatives, 1876–'77." Said warrant is duly endorsed by said A. O. Jones, clerk of the house of representatives.

The said pay certificates of members of the house of representatives are in the following form, to wit:

"No. —. Class A.

"HOUSE OF REPRESENTATIVES,
"COLUMBIA, S. C., *Dec.* 22, 1876.

"The State Treasurer

"Will pay to the order of Mr. ——— —— dollars, on account, for salary and mileage for attendance as a member of the house of representatives for the county of ———, for the regular session of 1876–'77.

"$——.

"(Signed) E. W. M. MACKEY, *Speaker.*
"(Signed) Attest: A. O. JONES, *Clerk.*"

The said certificates of members of the senate and president of the senate are in the following form, to wit:

"No. —. Class A.

"IN THE SENATE,
"COLUMBIA, S. C., *December* —, 1876.

"The State Treasurer

"Will pay to the order of Mr. ——— —— dollars, for salary and mileage for attendance as a member of the senate from the county of ———, for the regular session of 1876.

"(Signed) R. H. GLEAVESS, *President.*
"$——. Attest.
"(Signed) J. WOODRUFF, *Clerk.*"

And this defendant says that said pay certificates of the members of the house of representatives and of the members
56 of the senate of SouthCarolina are each and all properly indorsed by the member or officer to whose order they were

drawn, as is also the pay certificate of the president of the senate, and the same were delivered to him by Hon. F. L. Cardozo by the hand of James P. Low, as lawful evidence of indebtedness on the part of the State of South Carolina, and with the promise, on the part of him, F. L. Cardozo, State treasurer, that the same would be paid at the State treasury out of the first moneys received from the collection of taxes.

And this defendant says:

That he received said pay certificates and said comptroller's warrant at the face value thereof, and in good faith, and that he now holds the same. That the same are due from the State of South Carolina to him and are unpaid, though payment thereof has been demanded.

This defendant, therefore, demands judgment on account of said pay certificates and said warrant against the State of South Carolina, in the sum of eighteen thousand seven hundred and seventy dollars, with interest thereon at the rate of seven per cent. from the 20th day of December, A. D. 1876. And this defendant demands not only that the several sums of money set out above as due him and William Stone as copartners from the State of South Carolina, and also the sums due him individually from said State, shall be allowed as a counter-claim and set-off against the demands of the State in this action, but that this defendant shall have judgment against the State for a balance due him, over and above the amount claimed by the plaintiff, in the sum of nineteen thousand five hundred and seventy dollars ($19,570), with interest thereon at the rate of seven per cent. per annum, from the 20th day of December, A. D. 1876, with the cost of this action.

WILLIAM E. EARLE,
Defendant's Attorney.

57 Personally appears D. T. Corbin, who, being duly sworn, deposes and says that the above answer subscribed by him is true of his own knowledge, except so much thereof as is stated on information and belief, and that he believes it to be true.

Subscribed and sworn to this—day of——, 1878, before me.

58 EXHIBIT.

STATE *vs.* CORBIN & STONE.

Extract from letter of D. T. Corbin to Hon. Thomas C. Dunn, comptroller general of South Carolina:

"Now as to the second part of your letter, as to whether, of the balance in the hands of Corbin & Stone of the above moneys, they shall pay it over to the State, or shall be allowed a set-off against the same of their claim against the State for professional services rendered the State in the case of Comptroller General *vs.* The Savannah and Charleston Railroad Company, upon this head I repeat

what I have said in my former letter. This money was sued for and collected as damages for intrusion by the South Carolina Phosphate Company upon the property of the State. The fact that said company, after having exhausted and been overruled in their claim of right to said phosphate mine, on the ground of riparian proprietorship, were compelled to take shelter under an association with the grantees of the State, under the act of March 1, 1870, and, under that association, had a qualified right to mine said phosphate rock, can make no difference with this question. The company did not dig this rock under that act or that association at all, because they had never complied with any of the conditions of that act, which gave them the right to dig, viz.: Given the bond required as a condition precedent to mining, nor made the returns or paid the royalty by the act required at the end of the year. The company, on the other hand, claimed that they were digging the phosphate rock under their own right, independent of the rights that flowed
59 from association with the grantees of the State. The court overruled this claim and decreed against them, and the measure of damages was fixed against them at one dollar per ton for the phosphate rock dug, the same amount that they should have paid the State had they been mining under the act of March 1, 1870. That royalty named in the act was adopted as a mere measure of damages in this case. Any other might have been adopted by the court with propriety. Now, the 'phosphate royalty,' as it is termed in the various appropriation acts, and referred to by them, is the one dollar per ton paid by the companies who are and have been mining the phosphate rock in the beds of the navigable streams, under the conditions and provisions of the act of March 1, 1870, and who have, therefore, given the bond by that act required, made the returns by that act required, and paid the money, or are to pay it, to the State treasurer, as required by that act. You have no right, therefore, to say, as you do in your letter, that you regard this money as 'royalty,' in the technical sense of the appropriation acts. Should a suit be brought upon the bonds of any of said companies mining under said act of March 1, 1870, or direct against the companies for royalty due and unpaid, and a recovery should be had accordingly and the money collected, then that money might properly be considered 'royalty' on phosphate rock, in the sense of the acts of the Legislature. But that is not this case.

The Legislature did not, and could not, appropriate the proceeds of this suit until the same was collected and paid into the treasury. It is, therefore, in the hands of Corbin & Stone, to be accounted for by them. They have a just and valid claim (as admitted and appreciated by you) against the State, for services rendered in the attempt of the comptroller general (yourself and your predecessor) to enforce the rights of the State against the property of the Savannah and Charleston Railroad Company. They have a right to demand that their services in that suit, and the moneys they
60 have expended in behalf of the State in that suit, shall be set off against the claim of the State on the moneys in their hands. I will not do more than cite you to some authorities upon

this point: See United States *vs.* George Macdaniel, 7 Peters, 1; United States *vs.* Eleazer W. Ripley, 7 Peters, 18; United States *vs.* Thomas Fillebrown, 7 Peters, 28. See also *in re* Paschal, 10 Wallace, pages 492–493. These are all opinions of the Supreme Court of the United States, and on perusal I think you will find that my demand for a set-off is just and would be sustained by any court. If you do find this is so, I know it will give you pleasure to allow it, as you have so expressed yourself to me; and you also said the same thing in a letter to the late Attorney General Melton, written at my suggestion and upon this very question. The services of Corbin & Stone (mostly rendered by Corbin) in the Savannah railroad case have been very great; the cause is a large one and amount involved is large, and the services have been rendered in the Supreme Court of the State and of the United States, and the charges for these services are proportionately large. The cost of the suit has been large and the expenses of counsel have been large, and all have been borne by Corbin & Stone. The State has not paid a cent, or made any provision, that I am aware of, to pay anything to counsel for services in the cause. Corbin & Stone will, therefore, hold the moneys in their possession belonging to the State subject to their claim for services rendered the State in the matter of the Savannah and Charleston Railroad Company case.

"I have the honor to be, very respectfully, your obedient servant,

"June 16, 1876.

"D. T. CORBIN,
"*Of Corbin & Stone.*"

61 EXHIBIT.

STATE *vs.* CORBIN & STONE.

CHARLESTON, S. C., *February* 1, 1877.

Hon. Thos. C. Dunn, comptroller general S. C., Columbia, S. C.

DEAR SIR: Referring to previous correspondence we have had with you relative to the construction of the order of Judge Maher in the case of The State against The South Carolina Phosphate Company *alias* The Oak Point Mines, we now would respectfully request that you reconsider the question with a view to finally determining the matter.

We would also ask you to examine the accompanying account for our services rendered in the case of Daniel Hand *vs.* The Savannah and Charleston R. R. Co. These services were first requested by your predecessor, and, at your special request, the litigation then begun has been carried on by us until the matter is now before the Supreme Court of the United States. We have received no compensation whatever in this case, but, on the other hand, have necessarily expended a considerable sum for traveling expenses, printing, and the like. We think we have an indisputable right to retain, out of money in our hands, a sufficient sum to pay this account. In sup-

what I have said in my former letter. This money was sued for and collected as damages for intrusion by the South Carolina Phosphate Company upon the property of the State. The fact that said company, after having exhausted and been overruled in their claim of right to said phosphate mine, on the ground of riparian proprietorship, were compelled to take shelter under an association with the grantees of the State, under the act of March 1, 1870, and, under that association, had a qualified right to mine said phosphate rock, can make no difference with this question. The company did not dig this rock under that act or that association at all, because they had never complied with any of the conditions of that act, which gave them the right to dig, viz.: Given the bond required as a condition precedent to mining, nor made the returns or paid the royalty by the act required at the end of the year. The company, on the other hand, claimed that they were digging the phosphate rock under their own right, independent of the rights that flowed
59 from association with the grantees of the State. The court overruled this claim and decreed against them, and the measure of damages was fixed against them at one dollar per ton for the phosphate rock dug, the same amount that they should have paid the State had they been mining under the act of March 1, 1870. That royalty named in the act was adopted, as a mere measure of damages in this case. Any other might have been adopted by the court with propriety. Now, the 'phosphate royalty,' as it is termed in the various appropriation acts, and referred to by them, is the one dollar per ton paid by the companies who are and have been mining the phosphate rock in the beds of the navigable streams, under the conditions and provisions of the act of March 1, 1870, and who have, therefore, given the bond by that act required, made the returns by that act required, and paid the money, or are to pay it, to the State treasurer, as required by that act. You have no right, therefore, to say, as you do in your letter, that you regard this money as 'royalty,' in the technical sense of the appropriation acts. Should a suit be brought upon the bonds of any of said companies mining under said act of March 1, 1870, or direct against the companies for royalty due and unpaid, and a recovery should be had accordingly and the money collected, then that money might properly be considered 'royalty' on phosphate rock, in the sense of the acts of the Legislature. But that is not this case.

The Legislature did not, and could not, appropriate the proceeds of this suit until the same was collected and paid into the treasury. It is, therefore, in the hands of Corbin & Stone, to be accounted for by them. They have a just and valid claim (as admitted and appreciated by you) against the State, for services rendered in the attempt of the comptroller general (yourself and your predecessor) to enforce the rights of the State against the property of the Savannah and Charleston Railroad Company. They have a right to demand that their services in that suit, and the moneys they
60 have expended in behalf of the State in that suit, shall be set off against the claim of the State on the moneys in their hands. I will not do more than cite you to some authorities upon

this point: See United States *vs.* George Macdaniel, 7 Peters, 1; United States *vs.* Eleazer W. Ripley, 7 Peters, 18; United States *vs.* Thomas Fillebrown, 7 Peters, 28. See also *in re* Paschal, 10 Wallace, pages 492–493. These are all opinions of the Supreme Court of the United States, and on perusal I think you will find that my demand for a set-off is just and would be sustained by any court. If you do find this is so, I know it will give you pleasure to allow it, as you have so expressed yourself to me; and you also said the same thing in a letter to the late Attorney General Melton, written at my suggestion and upon this very question. The services of Corbin & Stone (mostly rendered by Corbin) in the Savannah railroad case have been very great; the cause is a large one and amount involved is large, and the services have been rendered in the Supreme Court of the State and of the United States, and the charges for these services are proportionately large. The cost of the suit has been large and the expenses of counsel have been large, and all have been borne by Corbin & Stone. The State has not paid a cent, or made any provision, that I am aware of, to pay anything to counsel for services in the cause. Corbin & Stone will, therefore, hold the moneys in their possession belonging to the State subject to their claim for services rendered the State in the matter of the Savannah and Charleston Railroad Company case.

"I have the honor to be, very respectfully, your obedient servant,

"June 16, 1876.

"D. T. CORBIN,
"*Of Corbin & Stone.*"

61 EXHIBIT.

STATE *vs.* CORBIN & STONE.

CHARLESTON, S. C., *February* 1, 1877.

Hon. Thos. C. Dunn, comptroller general S. C., Columbia, S. C.

DEAR SIR: Referring to previous correspondence we have had with you relative to the construction of the order of Judge Maher in the case of The State against The South Carolina Phosphate Company *alias* The Oak Point Mines, we now would respectfully request that you reconsider the question with a view to finally determining the matter.

We would also ask you to examine the accompanying account for our services rendered in the case of Daniel Hand *vs.* The Savannah and Charleston R. R. Co. These services were first requested by your predecessor, and, at your special request, the litigation then begun has been carried on by us until the matter is now before the Supreme Court of the United States. We have received no compensation whatever in this case, but, on the other hand, have necessarily expended a considerable sum for traveling expenses, printing, and the like. We think we have an indisputable right to retain, out of money in our hands, a sufficient sum to pay this account. In sup-

port of this view we would refer you to the following authorities, viz:

United States *vs.* McDaniel, 7 Pet., 1.
Do. *vs.* Ripley, 7 Pet., 18.
Do. *vs.* Fillebrown, 7 Pet. 28.
In re Paschal, 10 Wall., pp. 492–3.
United States *vs.* Buchanan Crabbe, 563.

Yours, very respectfully, CORBIN & STONE.

62 EXHIBIT.

STATE *vs.* CORBIN & STONE.

State of South Carolina, by Hon. Solomon L. Hoge, comptroller general, to Corbin & Ston[illegible] DR.

1875.			
March 1.	To retaining fee in case to obtain possession under statute of Savannah and Charleston R. R.	$1,000	00
	To preparation of petition and filing same in cause of Daniel Hand *vs.* S. & C. R. R. Co., and taking order to show cause, &c.	550	00

State of South Carolina, by Hon. Thomas C. Dunn, comptroller general.

April 2.	To preparation and argument in matter of taking possession of the S. & C. R. R., before court common pleas for Charleston county.	500	00
May	To preparation and argument before State supreme court of case You *in re* Daniel Hand *vs.* S. & C. R. R. Co. *et al.* (Decree in your favor.)	1,000	00
	Amount carried forward	$3,050	00

63 Amount brought forward $3,050 00

June 14.	To giving notice and argument of motion in case, You *in re* Daniel Hand *vs.* S. & C. R. R. Co. *et al.*, to enforce decree of supreme court in your favor before court of common pleas	150	00
July 2.	To preparation of record and appeal in case You *in re* Daniel Hand *vs.* S. & C. R. R. Co., from decision of Judge Reed refusing to enforce decree of State supreme court	100	00
15.	To motion made in supreme court and argument of same to docket and have heard the appeal from the decision of Judge Reed in case You *in re* Daniel Hand *vs.* S. & C. R. R. Co.	250	00

	23. To preparation of printed argument in case, You *in re* Daniel Hand *vs.* S. & C. R. R. Co., and delivering the same before the supreme court at Columbia	500	00
	23. To cash paid expenses to Columbia and return	33	90
	23. To preparation, in printed form, proceedings against Mitchell, receiver, and advisory board of S. & C. R. R. Co. for contempt, and presenting same with argument before supreme court	250	00
Sept.	20. To cash paid telegrams from Wilkes about record in case You *in re* Daniel Hand *vs.* S. & C. R. R.		95
	Amount carried forward	$4,334	85
64	Amount brought forward	$4,334	85
Nov.	8. To going to Columbia to obtain certificate of clerk of supreme court relative to completeness of record in case You *in re* Daniel Hand *vs.* S. & C. R. R., filed in Supreme Court U. S., for use at Washington	100	00
Nov.	15. To preparation of printed argument and submitting the same to Supreme Court U. S. at Washington, in case You *in re* Daniel Hand *vs.* S. & C. R. R. (three weeks in Washington)	2,500	00
	15. To cash paid expenses	50	00
	15. To cash paid T. J. D. Fuller, attorney at Washington, for services in said case	100	00
	27. To cash paid Edward Perry for printing records and arguments in case You *in re* Daniel Hand *vs.* S. & C. R. R. Co. *et al.*	148	75
1876.			
Jan.	4. To printed argument prepared and submitted to Supreme Court U. S. in reply to second argument of Phillips in case You *in re* Hand *vs.* S. & C. R. R.	500	00
April	3. To preparation of notice of motion to advance on docket case You *in re* Hand *vs.* S. & C. R. R., preparing and printing elaborate affidavit of Courtenay as evidence on said motion, preparing printed argument on same and submitting it to U. S. Supreme Court in person at Washington, D. C.	1,500	00
	Amount carried forward	$9,233	60

65	Amount brought forward		$9,233 60
April 10.	To attendance on U. S. Supreme Court from April 3d to April 10th, waiting to argue case You *in re* Daniel Hand *vs.* S. & C. R. R., if same was advanced, as was believed same would certainly be		700 00
10.	To cash paid Edward Perry for printing affidavit of Courtenay *in re* Hand *vs.* S. & C. R. R.		18 00
10.	To cash paid expenses		100 00
10.	To cash paid Edward Perry for printing brief of argument on motion to advance case You *in re* Daniel Hand *vs.* S. & C. R. R.		15 00
			$10,056 60
	In our hands to credit of comptroller general		10,262 66
	Balance due State		$206 06

66 *Separate Answer of William Stone.*

THE STATE OF SOUTH CAROLINA, *Richland County:*

In the Court of Common Pleas.

THE STATE OF SOUTH CAROLINA, Plaintiff,
against
D. T. CORBIN and WILLIAM STONE, as Copartners under the firm name of Corbin & Stone, Defendants.

William Stone, one of the late firm of Corbin & Stone, the defendants named in the above-entitled cause, for himself answering the plaintiff's complaint, says:

1. That as to the allegations of the first paragraph of the complaint, relative to the copartnership existing between said David T. Corbin and himself, for the purpose of practicing law, and their admission to practice law in courts of the State, he admits the same to be true. But he further says that said copartnership was dissolved some time in September, A. D. 1877, in consequence of his removal from the State of South Carolina to the State of New York.

2. That as to the allegations contained in the second paragraph of the complaint he denies the same to be true, except as hereinafter stated, viz:

That on the 29th day of October, A. D. 1873, the State of South Carolina instituted a suit in the circuit court in the common pleas for Beaufort county against The South Carolina Phosphate Company, limited, otherwise known as The Oak Point Mines.

67 That D. T. Corbin and this defendant, then copartners in the practice of law, and doing business at Charleston, were employed by the then attorney general of the State, Hon. Samuel W. Melton, to bring said suit and conduct the same to conclusion.

That a judgment and decree was recovered in said suit for the State after more than two years' litigation, and the defendant in said suit, pursuant to the final judgment and decree therein (entered up November 11, 1875), some time in November, 1875, and before March, 1876, at different times and in different amounts, paid to the firm of Corbin & Stone the aggregate sum of twenty-eight thousand dollars ($28,000.00), principal sum, and two hundred and thirty-five dollars and seven cents ($235.07) as costs of suit for the use of the State; total amount, twenty-eight thousand two hundred and thirty-five $\frac{7}{100}$ dollars.

3. That as to the allegations contained in the third paragraph of the complaint this defendant denies the same, except as to the demand for money as therein alleged, which this defendant admits to be true..

4. That as to the allegations contained in the fourth paragraph of the complaint this defendant, as to himself, admits the same to be true.

5. This defendant denies that any interest is due upon the alleged claim of plaintiff.

For a defense to this action this defendant says:

That some time in October or November, A. D. 1873, the precise date this defendant cannot now state, the law firm of Corbin & Stone, defendants named in this action, then doing business at Charleston, South Carolina, were employed by the attorney general of South Carolina, Hon. Samuel W. Melton, to commence and conduct, on behalf of the State of South Carolina, a suit against the South Carolina Phosphate Company, limited, *alias* The Oak Point Mines.

68 Pursuant to said employment said Corbin & Stone examined the questions involved in the proposed suit, determined the form of procedure, prepared an information or complaint and summons against said company and submitted the same to the attorney general for his official signature, which was affixed. The summons is dated October 29th, 1873, and the same was duly served upon the defendant company. The course of action, the proceedings and orders taken, the judgment recovered, and the allowance of compensation for professional services to D. T. Corbin and William Stone were and are substantially as follows:

The South Carolina Phosphate Company was mining and removing from the bed of North Wimbee creek the phosphate rock, and claimed the right to do so on the ground of riparian proprietorship and the non-navigability of said creek. The State, on the contrary, claimed that the phosphate mine or deposit was the property of the State, and, on the ground that North Wimbee creek was a public, navigable stream, within the ebb and flow of the tide, that the land covered by the waters of such stream, and consequently all mines therein, was the property of the State. The real point of the controversy was as to the title to the phosphate deposit in the bed of said creek. The proceedings taken to determine this question were the natural and necessary ones, and in accordance with the facts stated. The information on behalf of the State was filed in the said

circuit court for Beaufort county against said company, alleging (1) that said company had intruded upon the property of the State by mining and removing from the bed of said stream 15,000 tons of phosphate rock of the value of $90,000. (2.) That said company was engaged and intended to continue the business of mining and removing phosphate rock from the bed of North Wimbee creek without permission from the State. The information prayed judgment against said company for $90,000, and a perpetual injunction restraining said company from mining and removing the phosphate rock from the bed of said stream. At the same time the
69 summons and a copy of the information were served on the defendants there was served notice of a motion for a preliminary injunction to restrain said company from mining and removing said phosphate rock in said stream pending the litigation. This motion was a proper one, but in reply to it the defendant showed that the business had been going on two or three years, and that a large amount of capital was invested and a great injury would result from stoppage, and offered to secure the State from all damage if allowed to proceed with mining operations, in the event of its being determined ultimately that the company had not good right and title to mine, etc.

The matter was submitted to the court and an order taken accordingly allowing the company to proceed with its mining operations, but requiring the execution of a bond in the sum of ($50,000.00) fifty thousand dollars to save the State harmless therefrom, and directing that said bond be filed of record in the cause with the clerk of court, subject to the order of the court. This bond was duly executed by the company and filed as required, and the mining operations of the company proceeded as usual. The cause proceeded. It was referred to Asher D. Cohen, Esq., as referee, to report generally, and to report any special matter. In June, 1874, the referee reported. This report is in substance that the State, by an act of March 1, 1870, had given certain persons named, and such persons as they should associate with them, the right, on certain conditions, to mine and remove phosphate rock from the beds of the navigable streams of the State. That those parties had complied with the conditions of the act, and on the 14th day of March, 1870, had associated the defendant company in this case with themselves in the privileges of said act, with the right to defendant company to mine and remove the phosphate rock within certain boundaries in North and South Wimbee creek, upon the terms and conditions of said act. The defendants, however, had been careful in said instrument of association to assert that they had the right to
70 mine the phosphate rock by virtue of riparian proprietorship. That they assert the same now, because the creeks were not navigable streams, but, if found navigable, the company claimed the protection of its said association with the grantees, under the act of March, 1870.

The referee further reported that the defendant company claimed, if North Wimbee creek was navigable, their riparian and proprietary rights extended to low-water mark, and he reported that the

defendant company had dug, mined, and removed from the bed of North Wimbee creek, within the boundary lines mentioned, below usual low-water mark, 5,984 tons of phosphate rock, and there was due the State on said rock $5,984, if said creek was a navigable stream. The referee further reported that said company had dug, mined, and removed from the bed of said stream, between usual high and low water marks, 4,237 tons of phosphate rock.

That if by virtue of riparian proprietorship the defendant company had a right to dig this rock, then nothing was due the State on account of it; but if it had no such right, then there was due the State, on account of it, the sum of $4,237. The referee finally reported for the determination of a jury, under the direction of the court, the question: "Is North Wimbee creek a navigable stream?" This report was adopted by the court only in part, viz., as to the facts found and it was again referred to the referee to report upon the remaining questions of fact. This reference involved the ascertainment of the facts relative to North Wimbee creek which, in law, made or did not make it a navigable stream. These references ran through many months, and resulted in a voluminous report with the testimony. The facts ascertained from the report and testimony being fully argued before the court, upon consideration thereof the court held: (1) "that North Wimbee creek was a public, navigable stream;" (2) that the defendant company had good title to the land therein between usual high and low water mark; and (3) the State had title to the bed of said creek below usual
71 low-water mark, and that the State was entitled to a judgment in conformity to this decision. This opinion having been rendered on July 12, 1875, a decree was entered that the defendant do pay the plaintiff the sum of $5,984, as per report, and that plaintiff do have execution therefor. It was further ordered that the defendant company be restrained from mining the phosphate rock from that part of the bed of North Wimbee creek opposite to and adjoining the lands of the defendant and the centre of said stream, below usual low-water mark, until said defendant company should file in the office of the comptroller general of the State a bond in the penal sum of $50,000, conditioned and approved and renewable, according to the provisions of section 3 of the act of March 1, 1870.

On the same day that this order was granted, July 12, 1875, another order was granted for the purpose of ascertaining the amount of phosphate rock that had been mined by the company pending the litigation, and for which a bond had been required by the court, and given by the defendant. The order is as follows: "The defendant in the above-entitled cause having executed its bond in the penal sum of $50,000, conditioned to pay royalty, etc., if, in the ultimate determination of said cause, they shall be bound to do so, and, said bond having been filed in this court, it is ordered that it be referred to Asher D. Cohen, etc., to hear and determine how many tons of phosphate rock have been dug, mined, and removed from the bed of North Wimbee creek, below usual low-water mark, by the defendant company, in addition to the 5,984 tons of phosphate

rock reported cleared to October 1, 1873; also to determine and report the amount of royalty in money due by the defendant to the plaintiff on account of said phosphate rock so dug, mined, and removed." Under this order the references proceeded some time in October, 1875. The defendant company gave notice of appeal to the supreme court, November term, 1875, from the decree of Judge Maher of July 12, 1875, and hence all further pro-
72 ceedings under that decree for the collection of the money due thereunder was stayed. It was intimated some time in October by the defendant's counsel that the defendant had determined not to press the appeal. There being a term of court in session at Beaufort, where the cause was pending, and about to adjourn, upon the suggestion of the attorney general an order was taken referring it to Asher D. Cohen "to determine and report what per cent. of the fund collected in the above-entitled cause would be proper compensation to be paid to Messrs. Corbin & Stone for their professional services therein." This order was dated October 16, 1875.

At this time there had been no "fund collected in the above-entitled cause," and hence nobody had or could have any reference to such a fund but the fund to be collected. On the other hand there had been two distinct funds provided for by order of the court four months before, one for rock dug below usual low-water mark prior to proceedings in the cause, and the other for rock dug in same place pending proceedings in the cause. The first was ascertained in amount, but stayed in payment by appeal; the second was at reference to fix amount. The referee in his report under the order of October 16, 1875, says, after stating some of the considerations that govern him in his conclusions: "In the recommendation hereinafter made I have looked beyond the mere money decree that will be entered up against the defendant. This is one of the results of success, but, in my opinion, the smallest; the other and greater benefits are in the creation of a continuous annual income to the State, and in the establishment of a precedent by which future litigation in similar causes will be prevented. Two of the witnesses, Messrs. Simons and Buist, are of opinion that 75 per cent. of the amount received would be a fair and reasonable compensation. The other two, Messrs. Magrath and Simonton, that the plaintiff's counsel should be allowed 50 per cent. of the amount to be paid to the State under the decree, exclusive of the expenditures which they have been called upon to make in the conduct of the case.

After a careful consideration I find and recommend that 62½
73 per cent. of the fund collected in this case would be a proper compensation to be paid to Messrs. Corbin & Stone for their professional services therein; this to be exclusive of disbursements as set out in their statement submitted to me, amounting to $325.50." This report is dated October 28, 1875, and was submitted to the court on November 4, 1875; whereupon it was ordered "that said report be confirmed and stand as the judgment of the court." That at the time this report was made and at the time it was confirmed there had been no money collected in the cause. The report, in

terms, recognizes this fact, and the judgment of the court adopting the report as its judgment recognizes it, the words of said report being: "In the recommendation hereinafter made I have looked beyond the mere money decree that will be entered up against the defendant," viz., to final decree to be entered up fixing the amount of the defendant company's liability.

On November 9, 1875, the referee made his final report, under the order of reference of July 12, 1875. This report says "that 22,016 tons is the amount which the defendants have dug, mined, and shipped, and have on hand from the 1st of October, A. D. 1873, to October 1, 1875, taken from below usual low-water mark. * * * This 22,016 tons is in addition to the 5,984 tons heretofore reported cleared to October 1, 1873. * * * I also determine and report that the amount of money due from the defendant to the plaintiff on account of said phosphate rock so dug, mined, and removed is $22,016." On the 11th of November, 1875, this report was submitted to the court and confirmed and ordered to stand for the judgment and decree of the court, and it was further ordered that defendant pay to Corbin & Stone, counsel for plaintiff, the sum of $22,016, the amount stated in the report to be owing by defendant from October 1, 1873, to October 1, 1875, and that upon the payment of the same and of the further sum of $5,984, the amount heretofore adjudged to be owing by the defendant (which last payment the defendants are hereby authorized to make to Messrs. Corbin & Stone), the defendants to be discharged and released from
74 all further account and liability for claims in this cause to the 1st of October, A. D. 1875. This is the final decree, which for the first time determined the amount of money to be "collected in this cause," and is the decree to which the referee's report on compensation to be paid to Corbin & Stone clearly pointed.

The comptroller general of South Carolina, Thomas C. Dunn, at first held that this allowance of sixty-two and a half per cent. of the fund collected in the cause for the professional services of Corbin & Stone applied only to a portion of the fund collected in the cause, to wit, five thousand nine hundred and eighty-four dollars ($5,984), and not to the whole fund collected ($28,235.07). But upon a full investigation and discussion of the matter he abandoned said position and yielded to the construction and application of said decree above stated and set forth as the correct and necessary one. He so informed said Corbin & Stone in a letter of Feb. 10, 1877.

The extract from said letter is as follows: "On reflection and advice I have to inform you that I abandon the claim heretofore made on you on account of my construction of the decree for compensation and yield to your construction of that decree of the court in that behalf."

(The whole correspondence is ready to be produced.)

The fund as collected in the cause, as before stated, was twenty-eight thousand two hundred and thirty-five dollars and seven cents ($28,235.07). Sixty-two and one-half (62½) per cent. of this sum is seventeen thousand six hundred and forty-six dollars and ninety-one cents ($17,646.91), to which add the sum of three hundred and

twenty-five dollars and fifty cents ($325.50), disbursements made by Corbin & Stone in the cause, and it gives the aggregate sum of seventeen thousand nine hundred and seventy-two dollars and forty-one cents ($17,972.41) as the amount allowed Corbin & Stone as compensation for their professional services and disbursements in the said cause. This amount, by order of the court, they were authorized to retain out of the fund collected by them in the cause.

75 This being done, there remained in their hands to be accounted for to the State the sum of ten thousand two hundred and sixty-two dollars and sixty-six cents ($10,262.66.)

For the said sum ($10,262.66) said David T. Corbin and this defendant have duly accounted to the State as follows:

Some time in February, A. D. 1875, they were employed by the comptroller general of the State of South Carolina, then Hon. Solomon L. Hoge, to institute the necessary proceedings in his name, as representing the State, to obtain possession of the railroad and appurtenances of the Savannah and Charleston Railroad Company, under the provisions of an act entitled "An act to enable the Savannah and Charleston Railroad Company to complete their road," ratified on the 2d day of March, A. D. 1869. No agreement was made at the time between said comptroller general and said Corbin & Stone as to the amount of compensation to be paid them for the services to be rendered, except as to the retaining fee, which was fixed at one thousand dollars, as this defendant is informed and believes.

It was understood that a reasonable compensation should be paid for such advice and services as were rendered in the conduct of the cause. The attorney general of South Carolina, then Hon. Samuel W. Melton, subsequently, on the 27th of March, A. D. 1875, gave his official sanction to the proceedings in the cause, and in writing authorized said Corbin & Stone, if necessary, to represent him officially therein.

The preliminary proceedings in the cause were taken by Corbin & Stone on the 24th day of February, A. D. 1875, by preparing and serving on the president and receiver of the R. R. company, C. T. Mitchell, a written demand for the possession of the railroad and appurtenances of said R. R. company. This demand was refused by him.

Thereupon, on the first day of March, A. D. 1876, a petition was prepared and filed in the circuit court in the common pleas for Charleston county, signed by the comptroller general, in the

76 cause entitled Daniel Hand, plaintiff, *vs.* The Savannah and Charleston R. R. Company *et al.* (in which cause said Mitchell had been appointed receiver), which petition, after reciting the statute and grounds therefor, prayed in substance that said Mitchell should be directed by the court to deliver the possession of said Savannah and Charleston railroad, with its appurtenances, to him, said Solomon L. Hoge, as comptroller general of the State.

On the filing of said petition it was ordered by the court that said

Charles T. Mitchell do show cause on the 5th of March, A. D. 1875, why the prayer of the petition should not be granted.

The said Charles T. Mitchell, in response to said rule, showed numerous and various causes against the same, as also did Daniel Hand.

The said cause, being at issue, came on to be heard before the court on the 2d day of April, A. D. 1875, when, after full and elaborate argument made by Corbin & Stone on behalf of the petition, and by Hon. J. B. Campbell, Hon. Henry Buist, and other distinguished counsel on behalf of the respondent, it was "ordered and adjudged that the petition be dismissed and the prayer thereof be refused and the rule discharged."

Thereupon, on the 5th day of April, 1875, the petitioner (now Thomas C. Dunn, comptroller general of the State, in place of Solomon L. Hoge, resigned) gave notice of appeal to the supreme court from the said order and decree of April 2d, 1875.

Thereupon the case was duly prepared by Corbin & Stone on behalf of the petitioner for a hearing in the supreme court; the record was made up and duly certified and printed and filed in that court, and a legal argument was duly prepared and printed for that court.

Some time in May following the said cause was fully argued by Corbin & Stone on behalf of the comptroller general before the supreme court at Columbia, South Carolina.

77 On the 5th day of June, A. D. 1875, the supreme court announced its opinion and reversed the judgment of the circuit court dismissing the petition, and "ordered and adjudged that Thomas C. Dunn, comptroller general of the State, is authorized to take possession of the said Savannah and Charleston railroad with all its appurtenances, &c."

This decision was sent down to the circuit court of Charleston county for such orders as might be necessary to give it effect.

On June 14th, 1875, due notice thereof having been given, and preparation made, argument was made by Corbin & Stone in the circuit court for Charleston county upon motion to enforce the said decree of the supreme court of June 5th, 1875.

This motion was refused by the court, because at the hearing the attorney for Daniel Hand showed that a writ of error had been granted to have the decision of June 5th, 1875, reviewed by the Supreme Court of the United States, which writ, it was claimed, stayed further proceedings here until the determination of said court upon said writ of error.

From this decision an appeal to the supreme court of the State was taken July 2d, 1875, and a motion was made and argued by Corbin & Stone in said supreme court at Columbia, South Carolina, July 15th, 1875, to docket and have heard said appeal.

This motion was granted by the court and the cause entered on the docket, and the same came on and was argued by the said Corbin & Stone at Columbia July 23d, 1875. Printed arguments were duly submitted.

At the same time, previous notice having been given and preparation made, proceedings for contempt against C. T. Mitchell and the

advisory board of the Savannah and Charleston Railroad Company were submitted and argued by said Corbin & Stone.

Further proceedings in the cause were thenceforth removed to the United States Supreme Court at Washington. Due notice of
78 a motion to dismiss the writ here filed for want of jurisdiction was given by Corbin & Stone, and an elaborate printed argument was made and submitted by them on the 15th of November, 1875.

The waiting for the call of the cause and presentation of this argument involved three weeks' time in Washington.

On January 4th, 1876, a further printed argument, in reply to argument in behalf of Daniel Hand, was submitted to the United States Supreme Court by Corbin & Stone.

The United States Supreme Court declined to dismiss the appeal for want of jurisdiction then, but reserved the question for determination on the final argument of the cause.

Thereupon notice of a motion to advance the cause upon the docket of the United States Supreme Court was given. This motion came on to be heard April 3, 1876.

An elaborate statement of the pecuniary liability of the State on account of the Savannah and Charleston railroad, of the condition of the railroad, and its debts and its management, was prepared in the form of an affidavit, sworn to by William C. Courtenay, and also a printed argument was prepared by Corbin & Stone, and the same submitted to the court. The court, contrary to reasonable expectation, declined to advance the cause. Said Corbin & Stone, in the conduct and management of said cause, and as to all proceedings in the supreme court of South Carolina and in the Supreme Court of the United States, were in constant communication and consultation with Hon. Thos. C. Dunn, comptroller general of South Carolina, and they acted under his instructions. He required every and constant effort to be made that was in any way likely to result in the early removal of the obstacles to the taking possession by him of the said Savannah and Charleston railroad.

After it was finally ascertained that said cause would have to stand upon the dockt of the United States Supreme Court for two or three years to be heard on its merits when reached there in the regular order of business, these defendants submitted their account for professional services rendered and disbursements made in said
79 cause to Hon. Thos. C. Dunn, comptroller general of South Carolina, for approval and payment, and especially asked that their said claim on account of said services and disbursements should be allowed them in set-off against moneys in their hands collected by them in the suit of The State against The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines. An extract from a letter of D. T. Corbin, of June 17, 1876, to Hon. Thomas C. Dunn, comptroller general, claiming this set-off, is appended and made part of this answer.

Also a copy of the account of Corbin & Stone for professional services rendered and disbursements made by them in said cause, as finally submitted to Hon. Thomas C. Dunn, comptroller general of

South Carolina, together with a letter of advice of Corbin & Stone, dated February 1, 1877, is appended, and made a part of this answer.

The comptroller general, Hon. Thomas C. Dunn, replying to this letter of June 17, 1876, and this letter of February 1, 1877, in a letter to Corbin & Stone, dated February 10, A. D. 1877, said:

"As to your claim for professional services rendered in the case of Comptroller General of South Carolina against the Savannah and Charleston Railroad Company, I think you are justly entitled to the same, and your account submitted is approved by me.

"This approval is given with the understanding that you shall conduct the suit to conclusion in the United States Supreme Court without further charge in that behalf."

The said cause is still pending in the United States Supreme Court, is No. 201 on the docket of the present term, and the said Corbin & Stone have prepared and filed printed argument therein, and are ready and willing to deliver the same orally when the cause is reached.

This allowance of the said account of Corbin and Stone for $10,056.60 being made, the said comptroller general subsequently, duly,
80 and formally settled with Corbin and Stone, and allowed them said account in set-off against the claim of the State on the moneys in their hands collected in the suit against The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines, and he certified the said settlement and the balance due thereon to the State from Corbin and Stone to the State Treasurer, as follows:

"STATE OF SOUTH CAROLINA,
"OFFICE OF COMPTROLLER GENERAL,
"COLUMBIA, *March* 8, 1877.

"Hon. F. L. Cardozo, State treasurer.

"SIR: By the settlement this day made by Messrs. Corbin and Stone in the case of the Oak Point Mining Company they are indebted to the State of South Carolina a balance amounting to two hundred and six $\frac{6}{100}$ dollars, which amount you will please collect from them.

"Respectfully,

"(Signed) THOM. C. DUNN,
"*Comp. Gen.*"

That subsequently to the said settlement and the receipt of the certificate thereof the said Corbin and Stone did pay to the treasurer of the State of South Carolina (then S. L. Leaphart) the said balance due the State of two hundred and six dollars and six cents ($206.06), and received his receipt therefor, and the same is ready to be produced in this cause.

This defendant says that said Corbin and Stone fully and duly accounted with the proper officers of the State of South Carolina, the comptroller general and the State treasurer thereof, for all the moneys collected and received by them for the use of the State in the
81 case of State of South Carolina *vs.* The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines.

That said accounting was equitable, just, and legal, and the settle-

ment made was such as in law said officers were authorized to make, and the same is binding and conclusive both upon the State of South Carolina and upon this defendant and upon Corbin and Stone as to all matters embraced therein; and the said plaintiff and present comptroller general of South Carolina, Johnson Hagood, and the present attorney general, Leroy F. Youmans, and all other officers of the State government of South Carolina, are in law estopped from demanding, having, or receiving from said Corbin and Stone, or either of them, any further sum or sums of money, or any further accounting in the matter of moneys collected by them (Corbin & Stone) in the suit entitled The State of South Carolina against The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines.

This defendant further says, on information and belief, that the plaintiff, through its legislative department, has neglected and refused, and still does neglect and refuse, to make any appropriation or provision whatever for the payment to said firm of Corbin & Stone of their accounts for professional services rendered and moneys by said firm laid out and expended at the request of the plaintiff in the said suit and proceedings against The South Carolina Phosphate Company, limited, otherwise known as The Oak Point Mines, and for the possession of the property of the said Savannah and Charleston Railroad Company. That the moneys received by said firm of Corbin & Stone, as aforesaid, were not moneys specifically appropriated by law to the payment of particular claims against the State, and that the same were properly applicable to the payment of the said claims of said firm.

That the said plaintiff has made no provision by which this defendant and his codefendant, D. T. Corbin, can sue it for the
82 amount due them, and that they would have been remediless in the premises had they not retained out of money of plaintiff in their hands the amounts admitted by the plaintiff, through its proper accounting officers, to be justly due and owing to them.

And this defendant further says:

That the State of South Carolina was, at the time of the commencement of this suit, and now is, indebted to his late copartner, D. T. Corbin, and himself, in the sum of seventeen thousand nine hundred and seventy-two dollars and forty-one cents ($17,972.41) for services rendered as attorneys in the case of State *vs.* The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines—the same being sixty-two and one-half per cent. (62½) of the amount ($28,235.07) collected in the cause, and by the court of Beaufort county adjudged to be proper compensation for the professional services of said Corbin, & Stone in said cause; also indebted to his late copartner, D. T. Corbin, and himself in the further sum of ten thousand and fifty-six dollars and sixty cents ($10,056.60) for professional services rendered in the cause of comptroller general of South Carolina, petition *in re* Daniel Hand *vs.* The Savannah and Charleston Railroad Company, at the special instance and request of said comptroller general. That the circumstances under which said services were rendered, the ser-

vices themselves, and the itemized account thereof are above set forth, and the same is here referred to for full particulars. Also, the plaintiff is further indebted to his late copartner, D. T. Corbin, and himself in the further sum of two hundred and six dollars and six cents ($206.06) for money paid and delivered by them to S. L. Leaphart, State treasurer, on the 9th day of June, A. D. 1877.

And this defendant hereby offers that the said several sums of $17,972.41, $10,056.60, and $206.06, amounting to $28,238.07, due to the said firm of Corbin & Stone by the plaintiff, be set off the plaintiff in satisfaction of the sum alleged to be due to the plaintiff
83 in this cause. And this defendant, having fully answered, prays judgment against the plaintiff for the costs of this action.

WM. E. EARLE,
Defendant's Attorney.

Personally appears William Stone, who, being duly sworn, deposes and says that the above answer subscribed by him is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

——— ———.

Subscribed and sworn to this — day of —, 1878, before me.

——— ———.

(Original duly subscribed and verified.)

EXHIBIT.

STATE *vs.* CORBIN & STONE.

Extract from letter of D. T. Corbin to Hon. Thomas C. Dunn, comptroller general of South Carolina:

"Now as to the second part of your letter, as to whether, of the balance in the hands of Corbin & Stone of the above moneys, they shall pay it over to the State, or shall be allowed a set-off against the same of their claim against the State for professional services rendered the State in the case of Comptroller General *vs.* The Savannah and Charleston Railroad Company, upon this head I repeat what I have said in my former letter. This money was sued for and collected as damages for intrusion by the South Carolina Phosphate Company upon the property of the State. The fact that said company after having exhausted and been overruled in their claim of right to said phosphate mine, on the ground of riparian proprietorship, were compelled to take shelter under an association with the grantees of the State, under the act of March 1, 1870, and, under that asso-
84 ciation, had a qualified right to mine said phosphate rock, can make no difference with this question. The company did not dig this rock under that act or that association at all, because they had never complied with any of the conditions of that act, which gave them the right to dig, viz: Given the bond required as a condition precedent to mining, nor made the returns or paid the royalty by the act required at the end of the year. The company, on the

other hand, claimed that they were digging the phosphate rock under their own right, independent of the rights that flowed from association with the grantees of the State. The court overruled this claim and decreed against them, and the measure of damages was fixed against them at one dollar per ton for the phosphate rock dug, the same amount that they should have paid the State had they been mining under the act of March 1, 1870. That royalty named in the act was adopted as a mere measure of damages in this case. Any other might have been adopted by the court with propriety. Now, the 'phosphate royalty,' as it is termed in the various appropriation acts, and referred to by them, is the one dollar per ton paid by the companies who are and have been mining the phosphate rock in the beds of the navigable streams, under the conditions and provisions of the act of March 1, 1870, and who have, therefore, given the bond by that act required, made the returns by that act required, and paid the money, or are to pay it, to the State treasurer, as required by that act. You have no right, therefore, to say, as you do in your letter, that you regard this money as 'royalty,' in the technical sense of the appropriation acts. Should a suit be brought upon the bonds of any of said companies mining under said act of March 1, 1870, or direct against the companies for royalty due and unpaid, and a recovery should be had accordingly and the money collected, then that money might properly be considered 'royalty' on phosphate rock, in the sense of the acts of the Legislature. But that is not this case.

The Legislature did not, and could not, appropriate the pro-
85 ceeds of this suit until the same was collected and paid into the treasury. It is, therefore, in the hands of Corbin & Stone, to be accounted for by them. They have a just and valid claim (as admitted and appreciated by you) against the State, for services rendered in the attempt of the comptroller general (yourself and your predecessor) to enforce the rights of the State against the property of the Savannah and Charleston Railroad Company. They have a right to demand that their services in that suit, and the moneys they have expended in behalf of the State in that suit, shall be set off against the claim of the State on the moneys in their hands. I will not do more than cite you to some authorities upon this point: See United States *vs.* George Macdaniel, 7 Peters, 1; United States *vs.* Eleazer W. Ripley, 7 Peters, 18; United States *vs.* Thomas Fillebrown, 7 Peters, 28. See also *in re* Paschal, 10 Wallace, pages 492–493. These are all opinions of the Supreme Court of the United States, and on perusal I think you will find that my demand for a set-off is just and would be sustained by any court. If you do find this is so, I know it will give you pleasure to allow it, as you have so expressed yourself to me; and you also said the same thing in a letter to the late Attorney General Melton, written at my suggestion and upon this very question. The services of Corbin & Stone (mostly rendered by Corbin) in the Savannah railroad case have been very great; the cause is a large one and amount involved is large, and the services have been rendered in the Supreme Court of the State and of the United States, and the charges for these services

are proportionately large. The cost of the suit has been large and the expenses of counsel have been large, and all have been borne by Corbin & Stone. The State has not paid a cent, or made any provision, that I am aware of, to pay anything to counsel for services in the cause. Corbin & Stone will, therefore, hold the moneys in their possession belonging to the State subject to their claim for services rendered the State in the matter of the Savannah and Charleston Railroad Company case.

86 "I have the honor to be, very respectfully, your obedient servant,

"June 16, 1876.

"D. T. CORBIN,
"*Of Corbin & Stone.*"

87 EXHIBIT.

STATE *vs.* CORBIN & STONE.

CHARLESTON, S. C., *Feb.* 1*st*, 1877.

Hon. Thomas C. Dunn, comptroller general S. C., Columbia, S. C.

DEAR SIR: Referring to previous correspondence we have had with you relative to the construction of the order of Judge Maher in the case of The State against The South Carolina Phosphate Company, *alias* The Oak Point Mines, we now would respectfully request that you reconsider the question with a view to finally determining the matter.

We would also ask you to examine the accompanying account for our services rendered in the case of Daniel Hand *vs.* The Savannah and Charleston R. R. Co. These services were first requested by your predecessor, and, at your special request, the litigation then begun has been carried on by us until the matter is now before the Supreme Court of the United States. We have received no compensation whatever in this case, but, on the other hand, have necessarily expended a considerable sum for traveling expenses, printing, and the like. We think we have an indisputable right to retain, out of money in our hands, a sufficient sum to pay this account. In support of this view we would refer you to the following authorities, viz:

United States *vs.* McDaniel, 7 Pet., 1.
Do. *vs.* Ripley, 7 Pet., 18.
Do. *vs.* Fillebrown, 7 Pet. 28.
In re Paschal, 10 Wall., pp. 492–3.
United States *vs.* Buchanan Crabbe, 563.

Yours, very respectfully,

CORBIN & STONE.

88 EXHIBIT.

STATE *vs.* CORBIN & STONE.

State of South Carolina, by Hon. Solomon L. Hoge, comptroller general, to Corbin & Stone, DR.

1875.			
March 1.	To retaining fee in case to obtain possession under statute of Savannah and Charleston R. R.	$1,000	00
	To preparation of petition and filing same in cause of Daniel Hand *vs.* S. & C. R. R. Co., and taking order to show cause, &c.	550	00

State of South Carolina, by Hon. Thomas C. Dunn, comptroller general.

April 2.	To preparation and argument in matter of taking possession of the S. & C. R. R., before court common pleas for Charleston	500	00
May	To preparation and argument before State supreme court of case You *in re* Daniel Hand *vs.* S. & C. R. R. Co. *et al.* (Decree in your favor.)	1,000	00
June 14.	To giving notice and argument of motion in case You *in re* Daniel Hand *vs.* S. & C. R. R. Co. *et al.*, to enforce decree of supreme court in your favor before court of common pleas	150	00
	Amount carried forward	$3,200	00
89	Amount brought forward	$3,200	00
1875.			
July 2.	To preparation of record and appeal in case You *in re* Daniel Hand *vs.* S. & C. R. R. Co., from decision of Judge Reed refusing to enforce decree of State supreme court	100	00
July 15.	To motion made in supreme court and argument of same to docket and have heard the appeal from the decision of Judge Reed in case You *in re* Daniel Hand *vs.* S. & C. R. R. Co.	250	00
July 23.	To preparation of printed argument in case, You *in re* Daniel Hand *vs.* S. & C. R. R. Co., and delivering the same before the supreme court at Columbia	500	00
July 23.	To cash paid expenses to Columbia and return	33	90
July 23.	To preparation, in printed form, proceedings against Mitchell, receiver, and advisory board of S. & C. R. R. Co. for contempt, and presenting same with argument before supreme court	250	00

Sept.	20.	To cash paid telegrams from Wilkes about record in case You *in re* Daniel Hand *vs.* S. & C. R. R.	95
Nov.	8.	To going to Columbia to obtain certificate of clerk of supreme court relative to completeness of record in case You *in re* Daniel Hand *vs.* S. & C. R. R., filed in Supreme Court U. S., for use at Washington	100 00
		Amount carried forward	$4,334 85
90		Amount brought forward	$4,334 85
Nov.	15.	To preparation of printed argument and submitting the same to Supreme Court U. S. at Washington, in case You *in re* Daniel Hand *vs.* S. & C. R. R. (three weeks in Washington)	2,500 00
	15.	To cash paid expenses	50 00
	15.	To cash paid J. T. D. Fuller, attorney at Washington, for services in said case	100 00
	27.	To cash paid Edward Perry for printing records and arguments in case You *in re* Daniel Hand *vs.* S. & C. R. R. Co. *et al.*	148 75
1876.			
Jan.	4.	To printed argument prepared and submitted to Supreme Court U. S. in reply to second argument of Phillips in case You *in re* Daniel Hand *vs.* S. & C. R. R.	500 00
April	3.	To preparation of notice of motion to advance on docket case You *in re* Hand *vs.* S. & C. R. R., preparing and printing elaborate affidavit of Courtenay as evidence on said motion, preparing printed argument on same and submitting it to U. S. Supreme Court in person at Washington, D. C.	1,500 00
April	10.	To attendance on U. S. Supreme Court from April 3d to April 10th, waiting to argue case You *in re* Daniel Hand *vs.* S. & C. R. R., if same was advanced, as was believed same would certainly be	700 00
	10.	To cash paid expenses	100 00
	10.	To cash paid Edward Perry for printing affidavit of Courtenay *in re* Hand *vs.* S. & C. R. R.	18 00
		Amount carried forward	$10,041 60
91		Amount brought forward	$10,041 60

10. To cash paid Edward Perry for printing brief of argument on motion to advance case You *in re* Daniel Hand *vs.* S. & C. R. R. --	15 00
	$10,056 60
In our hands to credit of comptroller general	10,262 66
Balance due State	$206 06

92 *Correspondence between Messrs. Corbin & Stone and the State Officers of the Government of the State of South Carolina, Produced as Exhibits by the Defence in this Cause.*

STATE OF SOUTH CAROLINA, *Richland County:*

Court of Common Pleas.

THE STATE OF SOUTH CAROLINA, Plaintiff,

vs.

D. T. CORBIN and WILLIAM STONE, as Corpartners under the firm name of Corbin & Stone, Defendants.

(NOTE.—The case, as to William Stone, has been removed to the United States Circuit Court.)

93 *Note.*

The law firm of Corbin & Stone, of Charleston, S. C., was employed by the officers of the State of South Carolina to bring two important suits—one on behalf of the State of South Carolina against The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines; and the other on behalf of the comptroller general of the State of South Carolina, in his official capacity, against The Savannah and Charleston Railroad Company. The first of these suits was commenced on the 29th day of October, 1873, and was brought to restrain the defendant company from intruding upon a phosphate mine of the State, and to recover ninety thousand dollars damages for digging, mining, and removing from said phosphate mine (in North Wimbee creek, Beaufort county, S. C.) fifteen thousand tons of phosphate rock. After two years of sharp litigation the suit resulted in establishing the right of the State to the mine, substantially as claimed, and in a decree, entered November 11, 1875, for twenty-eight thousand dollars, principal sum, and two hundred and thirty-five dollars and seven cents, costs. This sum ($28,235.07) was, by said decree, directed to be paid over to Corbin & Stone, for the use of the State, and the same was accordingly so paid.

The other suit, entitled *ex parte* Thomas C. Dunn, comptroller general of South Carolina, *in re* Daniel Hand *vs.* The Savannah and Charleston Railroad Company, was commenced on March 1, 1875, and was, by petition of the comptroller general of South Carolina, filed in said suit of Hand against The Savannah and Charleston Railroad Company. The purpose of this petition was to enforce the right of the

State of South Carolina to the possession and sale of said rail-
94 road and its appurtenances, under the provisions of the act of the Legislature of March 2, 1869. The final determination of the supreme court of the State of South Carolina, (reversing the decision of the court below) sustained the right claimed by the comptroller general to the possession of the railroad, and a decree was entered directing that said road and its appurtenances be turned over to him.

But before this decree could be carried into effect an appeal therefrom was allowed to the Supreme Court of the United States, which stayed further action in the State courts, and removed the said cause to the Supreme Court of the United States, where it still remains.

During the progress of these two causes through the State courts, and subsequent thereto, much correspondence was had between Corbin & Stone and the officers of the State government of South Carolina; first, relative to the conduct of said causes, and, secondly, relative to the proper compensation of said Corbin & Stone for their professional services rendered therein.

Some difference of opinion as to the last-mentioned matter, was at first developed; but this difference was finally composed, and the claims of Corbin & Stone to compensation in the case of the State *vs.* The South Carolina Phosphate Company, limited, *alias* The Oak Point Mines, were admitted as determined by the court, and their account for services, rendered in the case of Comptroller General *vs.* The Savannah and Charleston Railroad Company, was allowed, settled, and ended by Thomas C. Dunn, then comptroller general of South Carolina.

Soon after the settlement of the accounts of Corbin & Stone with the State officers of South Carolina, as stated, a new set of State officers came (about April 10, 1877) into power, and they again called upon Corbin & Stone to state their relations to the aforementioned suits, their authority therefor, and again account to them for the money collected in said case of the State against The South Carolina
Phosphate Company.

95 Messrs. Corbin & Stone declined to reopen the matters settled with the former State officers (see letter No. 33, and following), and thereupon the new attorney general of South Carolina, James Conner, under the direction of the new comptroller general of South Carolina, Johnson Hagood, commenced this suit against them.

With this explanation, the following correspondence is intelligible. It covers forty-two letters, telegrams, and papers, and the same are numbered from one to forty-two, inclusive, and are printed for the convenient reference of the court and counsel upon the trial of the cause.

D. T. C.

96 CORRESPONDENCE.

No. 1.

Letter of Attorney General Melton to Messrs. Corbin & Stone.

EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL,
COLUMBIA, S. C., *March* 27, 1875.

Messrs. Corbin & Stone, attorneys-at-law, Charleston, S. C.

MY DEAR SIRS: I regret that upon my last visit to Charleston we failed to confer in reference to the proceedings, at the instance of the comptroller general, against The Savannah and Charleston Railroad Company. It occurs to me that you will find it necessary to make the attorney general a party to the proceeding. It is impossible for me to give personal attention to the matters at the moment; and, upon the suggestion of the comptroller general, I write to authorize you to represent me officially, if the necessity should arise.

Judge Hoge will be associated with you in the further conduct of the proceeding; and I have authorized him, also, to represent the attorney general in the matter.

Very respectfully, your ob't servant,

SAM'L W. MELTON,
Attorney General South Carolina.

No. 2.

Letter of Comptroller General Dunn to D. T. Corbin, of firm Corbin & Stone.

EXECUTIVE DEPARTMENT,
OFFICE OF COMPTROLLER GENERAL,
COLUMBIA, S. C., *March* 29, 1875.

Hon. D. T. Corbin.

MY DEAR SIR: I write to inform you that I adopt the pro-
97 ceedings as instituted by my predecessor in office, in reference to the action to obtain possession of the Savannah and Charleston Railroad Company, and direct that my name be entered in the case; and I further desire, on account of the large interest involved, on the part of the State, an immediate hearing in the matter.

Very respectfully, your ob't servant,

THOS. C. DUNN,
Comptroller General State of South Carolina.

No. 3.

Letter of D. T. Corbin, of Corbin & Stone, to S. L. Hoge, at Columbia, S. C., Associate Counsel, and to be shown Comptroller General Dunn.

CHARLESTON, S. C., *April* 2, 1875.

MY DEAR HOGE: The hearing in the case of *ex parte* Dunn, comptroller general, came up to-day according to order. I argued the case fully, and, if I have ever presented a case more satisfactorily

and confidently, I do not now remember it. Upon the other side, Buist, Campbell, Memminger, and Porter & Brawley were heard. Immediately upon the close of the argument, Judge Reed rendered his opinion, refusing the prayer of the petition, and dismissing the same. I need not assure you I was surprised. He placed his opinion upon several grounds, viz: (1) That the attorney general's act of 1871 repealed or superseded the act of 1869; (2) That the Savannah and Charleston railroad was in possession of the court—a fund in equity—and the court had no right to turn it over to the comptroller general, and turn it out of court; (3) That the State had selected its remedy under the act of 1871, submitted its rights in connection with the Savannah and Charleston Railroad Company for determination to the court in case of Hand, and hence could not now have the special remedy through the comptroller general provided for in the act of 1869; (4) That the pendency in the supreme court of the case of State *ex rel.* the attorney general against
98 Savannah and Charleston Railroad Company, founded on the act of 1871, would preclude him from allowing the comptroller general to have the remedy given by act of 1869. I need not say that I think the court wholly wrong in the matter. I at once gave notice of appeal. Now, please show my letter to the comptroller and ask him if I shall at once press the appeal.

I am, truly yours,

D. T. CORBIN.

P. S.—Can the comptroller general furnish any money to pay expenses, such as printing, &c., and to sustain life while at work on the case?

D. T. C.

No. 4.

Letter of D. T. Corbin, of Corbin & Stone, to S. L. Hoge, Associate Counsel, at Columbia, S. C.

CHARLESTON, S. C., *May* 3, 1875.

MY DEAR HOGE: I have sent you argument prepared in matter of the Comptroller General against Savannah and Charleston Railroad Company, and I now send you record in the case of Daniel Hand *vs.* Savannah and Charleston Railroad Company—case in which the receiver was appointed—and copy of the decree; also a copy of judgment of Supreme Court in the said case. You may want them for reference. I am sorry to inform you that I don't see how I can be present at the argument. I am tied hand and foot before the adjourned term of the United States court that meets this week, and I do not see how I can get away. Am in several important cases; in fact, in all important ones to be tried, and I cannot be absent a day this week without obstructing the court and business. Chief Justice Waite and Judge Bond hold the court.

I think the printed argument sent you covers the main points in the cause. I notice an order printed in The News and Courier authorizing the receiver of the Savannah and Charleston Railroad Company to sell said road, provided he can sell it on certain terms.

This is all gotten up to place further obstacles in the way of
99 this proceeding on the part of the comptroller general. I do not see how it can succeed. The road is not sold, and there is probably not the least prospect that it will be, under the terms and conditions of said order. Besides, this order is subsequent to our proceedings, and without notice to us. It cannot, therefore, change the status of the railroad as respects the right of the comptroller general. If it was actually sold, and titles executed and in the possession of the purchaser, and this done before our proceedings, I think our jig would be up; but as it is, I don't see that it is. Please put the matter through, and I think my absence will not be missed.

Truly yours,

D. T. CORBIN.

I did not know of this order of sale till I read it in the paper this morning.

D. T. C.

No. 5.

Telegram of Comptroller General Dunn to Corbin & Stone.

(Received at Charleston 8th May, 6.25 p. m.)

COLUMBIA, S. C., *May* 8, 1875.

Messrs. Corbin & Stone:

Make immediate application for my being made a party to "Hand's" suit. Reason by mail.

THOS. C. DUNN,
Comptroller General.

No. 6.

Letter of Comptroller General Dunn to Corbin & Stone.

COLUMBIA, *May* 8, 1875.

Messrs. Corbin & Stone, Charleston.

DEAR SIRS: I telegraphed you this p. m. to make immediate application to the court for the purpose of making me, as comptroller, a party to the suit of "Hand" in the matter of the Charleston and Savannah railroad. The object of this move is to enable me to appeal from the order or decree of Judge Reed authorizing the receiver
to sell the road in case the decision of the Supreme Court
100 should be adverse to us in the present appeal. I have reason to believe that an effort is to be made to have the sale completed in a few days—even before the decision in the present case is given—so as to give us trouble in getting possession. I suppose Judge Reed would hardly approve any sale made under this decree until after a decision of the Supreme Court on your appeal. Still, it might be done, and it is as well to calculate upon anything being done that it is possible to do to effect the object of the parties in Charleston.

Yours truly,

THOS. C. DUNN.

Fo. 7.

D. T. Corbin, of Corbin & Stone, to Comptroller General Dunn.

CHARLESTON, S. C., *May* 18, 1875.

Hon. Thomas C. Dunn, comptroller general South Carolina.

MY DEAR SIR: Mr. Perry has called on me several times for the money on his bill for printing record and papers in the matter of the Savannah and Charleston Railroad Company. He needs it, he says, very badly, and, if possible, I hope you will pay him, and so keep him off of me. I sent the bill to Mr. Hoge, and I suppose he has handed it to you.

Truly yours,

D. T. CORBIN.

No. 8.

D. T Corbin, of Corbin & Stone, to Comptroller General Dunn.

CHARLESTON, S. C., *May* 31, 1875.

Hon. Thomas C. Dunn, comptroller general South Carolina.

DEAR SIR: Allow me to call your attention to the bill of Mr. Edward Perry for printing the record and argument in the case of Savannah and Charleston Railroad Company. He is continually calling at my office to obtain payment of the bill. Please inform me whether you — arrange the matter.

Truly yours,

D. T. CORBIN.

101 No. 9.

William Stone, of Corbin & Stone, to Comptroller General Dunn.

CHARLESTON, S. C., *September* 10, 1875.

Hon. T. C. Dunn, comptroller general of South Carolina, Columbia, S. C.

DEAR SIR: The rules of the Supreme Court require that a statement shall be made of every case argued before it, and that on a motion to dismiss a copy of the brief must be served, with the notice of motion, three weeks before argument is had. Now, the statement of the Savannah and Charleston railroad case will occupy about twenty pages or more of print. It will cost about forty or fifty dollars to have it printed here.

Now, can't some of the offices in Columbia do it for you without charge, or, at any rate, as a piece of official printing?

If so, it will be a help to me, and I'll send the copy for the printer early next week. The whole case can be got ready for service by next Friday or Saturday, and in ample time for the Supreme Court.

Yours, truly,

WILLIAM STONE,
For CORBIN & STONE.

No. 10.

William Stone, of Corbin & Stone, to Comptroller General Dunn.

CHARLESTON, S. C., *September* 13, 1875.

Hon. Thomas C. Dunn, comptroller general of South Carolina, Columbia, S. C.

DEAR SIR: Your telegram of to-day is at hand. I send you herewith, by express, the brief in the Savannah and Charleston railroad case. Please have the printers get it up as soon as possible. I gave the other side notice to-day that we should move to dismiss the writ on the 18th of October.

This is the third Monday in October. The Court meets
102 on the second Monday, and I didn't suppose it would be likely to hear motions on that day. Tuesday is the only day in the week when motions are heard.

If you read the brief before it goes to the printer and notice any mistake or omission, please advise me.

I suppose I am correct in saying, as I do, that no copy of the writ of error was lodged for you in the office of the clerk of the Supreme Court. I have written to Boozer to make a certificate to that effect, if the fact be true.

Yours, respectfully,

WILLIAM STONE,
For Corbin & Stone.

No. 11.

Letter of Attorney General Melton to Corbin & Stone.

EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL,
COLUMBIA, S. C., *October* 13, 1875.

STATE *vs.* SOUTH CAROLINA PHOSPHATE COMPANY.

Messrs. Corbin & Stone, attorneys-at-law, Charleston, S. C.

GENTLEMEN: I have received your letter in reference to fee in this case, and have to thank you for copy of the brief. You are clearly entitled to a fee, and, in view of the amount of work and the success attending it, a very liberal one. But I am without means to respond. The General Assembly, at the last session, appropriated seven thousand five hundred dollars for litigation, but only one-half of that amount has been paid, and this has been exhausted. Over the fund which may result from the litigation I can have no control, nor can any one, after it shall have gone into the treasury, except by way of regular appropriation. Why may you not, by a motion in the cause, have your fee ascertained and paid out of the fund in the cause? To this I do not think it my duty to object, and I suggest it as the only mode which occurs to me by which you can be paid for your services.

Very truly yours,

SAMUEL W. MELTON,
Attorney General.

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No. 12.

Letter of Corbin & Stone to Attorney General Melton.

CHARLESTON, S. C., *October* 28, 1875.

STATE *vs.* SOUTH CAROLINA PHOSPHATE COMPANY.

Hon. Samuel W. Melton, attorney general.

DEAR SIR: By order of Judge Maher, it was referred to Asher D. Cohen, referee, to determine and report what per cent. of the fund recovered in the above-entitled cause would be proper compensation to be paid to Corbin & Stone for their professional services therein. The references have been held by Mr. Cohen under this order, at which Judge Magrath, Mr. Simonton, Mr. T. Y. Simons, and Mr. Henry Buist were present as witnesses. Upon their testimony the referee has, with his own knowledge of the cause, found and reported that 62½ per cent. of the fund recovered in said cause would be proper compensation to be paid Corbin & Stone for their services rendered therein; that they also be paid $325.50, disbursements made in the conduct of the cause.

Now, will you be so kind as to signify your acquiescence in said report, or that you do not feel it your duty to object thereto.

Very truly yours,

D. T. CORBIN,
For Corbin & Stone.

No. 13.

Letter of Attorney General Melton to Corbin & Stone.

EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL,
COLUMBIA, S. C., *November* 4, 1875.

THE STATE *vs.* SOUTH CAROLINA PHOSPHATE COMPANY.

Messrs. Corbin & Stone, attorneys-at-law, Charleston, S. C.

DEAR SIRS: Your letter enclosing report of Asher D. Cohen, Esq., referee, upon reference to determine what per cent. of the
104 fund collected in the above-entitled cause would be proper compensation to be paid for your professional services therein, has been received. In reply I have to say that I do not think it my duty to interfere and object to the confirmation of the report. The compensation has certainly been well merited, as well in view of the amount and success of the work done as in view of the ultimate result in increasing the revenues of the State. If the General Assembly could be induced to provide adequate compensation for such services it would, perhaps, be advisable to turn over the entire fund into the treasury and receive payment by regular appropriation. It is idle to expect this, however, under existing circumstances. Do me the kindness to furnish a brief statement of the case to be, incorporated in my next annual report.

Very truly yours,

SAMUEL W. MELTON,
Attorney General.

No. 14.

Letter of D. T. Corbin, of Corbin & Stone, to Attorney General Melton.

CHARLESTON, S. C., *November* 10, 1875.

Hon. S. W. Melton, attorney general.

MY DEAR SIR: In accordance with your request, I have hastily prepared a sketch of the case of State *vs.* South Carolina Phosphate Company, and herewith enclose the same to you.

It may form the basis of what you wish to put in your annual report. Prune it and use it as you think best.

Since my return we have had one or two references to close up the case, and I have become greatly impressed with the fact of the absolute necessity of further references to ascertain what proportion of the phosphate rock is the property of the company, and what proportion is the property of the State. The line of low-water mark, which is decided to be the boundary line between the State and the company, is, as appears, a crooked, waving line, visible but
105 a few minutes at low water, and impossible almost of ascertainment at any other time. I think the best and most practicable solution of the problem is to determine, by further reference in the cause, what proportion of the phosphate rock is the property of the phosphate company, and what proportion is the property of the State, and upon this proportion require the company to return the rock and pay royalty thereon. This suggestion meets the views of the company, which desires to avoid further litigation with the State.

Please consider the matter and let me hear from you on the subject by the time of my return from Washington to New York. The company is urgent, as they desire to go on with their mining operations.

Very respectfully,

D. T. CORBIN.

No. 15.

Letter of D. T. Corbin, of Corbin & Stone, to Comptroller General Dunn.

CHARLESTON, S. C., *December* 1, 1875.

Hon. T. C. Dunn, comptroller general, South Carolina.

DEAR SIR: I have just received a note from Mr. Fuller, in Washington, in which he says that the death of Vice-President Wilson caused the Supreme Court to adjourn over one week (no opinions being pronounced a week ago last Monday); and last Monday the Court gave Mr. Phillips until the twentieth of December to file additional argument in the cause. Mr. P. represents Hand, you perhaps know. The United States Supreme Court is to adjourn over from the 18th December till the 2d January, the Chief Justice informed me. Therefore no decisions can now be expected until January 2d.

After Phillips files his additional argument I am given a week to reply.

I regret this delay very much, but there is no way of preventing it.

106 The United States Supreme Court is one of the most dignified courts in the whole world, and it moves slow, but sure. We are absolutely sure of a decision in our favor when it does come.

I have read Mr. Campbell's letter. It is bosh. He intimates that the case in the United States Supreme Court will be dismissed, but that he will go up again, &c. I know, but he does not yet, that the cause will be dismissed upon such grounds that he cannot go again to the United States Supreme Court until there has been a complete adjudication upon the merits (between the bondholders), and that must be after you are in possession. The Court will hold that the order putting you in possession is not an order from which an appeal will lie; that it is not a final order, and effects in no way detrimentally the rights of creditors.

Now, when the case is dismissed, and upon this ground, even Judge Moses will hardly grant another appeal. "Let the galled jade wince," &c.

We must exercise a little patience, but success is in the end certain.

Yours, truly,

D. T. CORBIN.

P. S.—May be in Columbia in a day or two.

D. T. C.

No. 16.

Letter of D. T. Corbin, of Corbin & Stone, to Comptroller General Dunn

CHARLESTON, S. C., *January* 26, 1876.

Hon. Thomas C. Dunn, comptroller general South Carolina.

DEAR SIR: I have to-day received a telegram from the clerk of the United States Supreme Court, in reply to one sent him, saying that the "motion to dismiss postponed until hearing of case on merits." Thus it appears that the Court has refused to decide the question of jurisdiction until a full argument is had upon the merits of the case.

107 We are not, therefore, beaten on our motion to dismiss the appeal in Hand *vs.* you, but may get it by and by. I think our next move is at once to move to advance the cause upon the docket and obtain a speedy hearing on the merits. I think this motion would be granted, on the ground that the State is a party, and the large public interests involved.

The postponement of the decision has taken everybody here by surprise, as it has, no doubt, all interested in Columbia. If it meets your approbation, I will at once give notice of a motion to advance the cause, and will argue the motion as soon as the time for notice will permit.

Truly yours,

D. T. CORBIN.

P. S.—Let me hear from you.

D. T. C.

No. 17.

Letter of Comptroller General Dunn to D. T. Corbin, of Corbin & Stone, at Charleston, S. C.

EXECUTIVE DEPARTMENT,
OFFICE OF COMPTROLLER GENERAL,
COLUMBIA, S. C., *January* 27, 1876.

D. T. Corbin, Esq'r.

DEAR SIR: Your favor of 26th at hand. I have been as much surprised as yourself at the postponement of the decision on your motion to dismiss before United States Supreme Court.

You will please press the matter to a hearing as rapidly as the rules or indulgence of the Court will allow. If allowed to linger, there will soon be no road left to fight over. What would be the effect if I have the road sold out for taxes due the State? I believe we have decision of Court in favor of the State, on the question of its liability; the amount due the State is about forty-six thousand dollars.

Yours, truly,

THOMAS C. DUNN.

No. 18.

Letter of Corbin & Stone to Comptroller General Dunn.

CHARLESTON, S. C., *March* 11, 1876.

Hon. Thomas C. Dunn, comptroller general South Carolina.

DEAR SIR: We wish, for the purpose of the argument about
108 to be made in the Supreme Court, to advance the cause, Dunn *vs.* Savannah and Charleston railroad, a statement from your office of the amount of bonds of the Savannah and Charleston Railroad Company, endorsed by the State.

This is necessary to show the interest of the State in the cause. Please furnish us a full statement under you official seal at your earliest convenience.

Very truly yours,

CORBIN & STONE.

No. 19.

Certificate of Comptroller General Dunn as to Bonds of Savannah and Charleston Railroad Company, Endorsed by State, Furnished to Corbin & Stone.

EXECUTIVE DEPARTMENT,
OFFICE OF COMPTROLLER GENERAL,
COLUMBIA, S. C., *March* 13, 1876.

Statement of bonds of the Savannah and Charleston Railroad Company, endorsed by the State of South Carolina.

Charleston and Savannah railroad bonds, payable in 1877, secured by first mortgage	$505,000 00
Savannah and Charleston railroad bonds, act of 1869, payable in 1889, secured by first mortgage	245,750 00
	$750,750 00

I hereby certify that the foregoing is a true statement of the amount of bonds of the Savannah and Charleston Railroad Company, endorsed by the State of South Carolina.

THOMAS C. DUNN,
Comptroller General.

No. 20.

Letter of Comptroller General Dunn to Corbin & Stone.

EXECUTIVE DEPARTMENT,
OFFICE OF COMPTROLLER GENERAL,
COLUMBIA, S. C., *April* 7, 1876.

Messrs. Corbin & Stone, Charleston.

109 DEAR SIRS: The fact of the payment of some $28,000 phosphate royalty, by the Oak Point Mining Company, into your hands having been reported here, and the holders of census warrants being clamorous for that portion of it applicable to their warrants, I send you this private note to say that it will be necessary for you to report to this office as to the amount coming to the State, after deducting the fee allowed you by the court; please attend to it at your earliest convenience. I have been asked about it by several persons within the last day or two, among others by the worthy State treasurer.

Yours, truly,

THOS. C. DUNN.

No. 21.

Letter of Wm. Stone, of Corbin & Stone, to Comptroller General Dunn.

(Personal.)

CHARLESTON, S. C., *April* 8, 1876.

Hon. Thomas C. Dunn, comptroller general of South Carolina, Columbia, S. C.:

DEAR SIR: Yours of the 7th inst. is at hand. Mr. Corbin is now in Washington, in attendance on the Supreme Court. He will return by the last of next week, and he can furnish you the statement you desire. He had entire charge of the matter.

Yours, respectfully,

CORBIN & STONE,
Per WM. STONE.

No. 22.

Letter of D. T. Corbin, for Corbin & Stone, to Comptroller General Thos. C. Dunn.

CHARLESTON, S. C., *April* 15, 1876.

Hon. Thomas C. Dunn, comptroller general South Carolina.

DEAR SIR: I have just received your letter of the 7th. During the past two weeks I have been in attendance upon the Supreme
110 Court at Washington, in the case of Daniel Hand *vs.* you

and have just returned home. I should have reported to you upon the subject-matter of your note (the amount due the State from the proceeds of the case State *vs.* The South Carolina Phosphate Company) but for the conversation relative to delay had with you on the subject. I now hasten to report as follows: The case of State *vs.* The South Carolina Phosphate Company, Limited, pending during the past three years, was brought to recover damages from said company on account of the phosphate rock dug, mined, and removed by it from North Wimbee creek, in Beaufort county, South Carolina, without permission from the State of South Carolina. After long and severe litigation the case was brought to a final decree last fall. The result was favorable to the State, and consisted in a judgment for damages, and a decree for the payment of royalty by said company hereafter upon one-half of all the phosphate rock by it dug, mined, and removed from the southern half of said North Wimbee creek. As the case was about terminated, I asked the attorney general how we were to be compensated for conducting it, and he suggested that the question of our compensation be referred to the court to determine, and when so determined that we be paid out of the fund realized in the cause. Thereupon we filed a petition in the cause, setting forth the services rendered, and asking compensation therefor out of the fund realized in the cause. This petition was referred to a referee, who took testimony and reported to the court that our services, under the circumstances, were reasonably worth sixty-two and one-half per cent. of the money realized in the cause, exclusive of costs and disbursements (paid by us), amounting to three hundred and twenty-five dollars and fifty cents ($325.50). This report was confirmed and ordered to stand as the judgment of the court. Now, deducting the amount allowed us by the court from the amount collected in the cause leaves a balance in our hands to the credit of the State of ten thousand two hundred and sixty-two dollars and sixty-six cents ($10,262.66).

Now, what is done with this money?

111 We have, as you know, been conducting a suit of very great importance on behalf of the State, in your name, as comptroller general, to obtain possession of the Savannah and Charleston railroad, and said cause is now pending in the Supreme Court of the United States on appeal from the decision of the supreme court of this State, favorable to you. That suit has been a very expensive one to us, requiring a large expenditure of time and considerable money on our part. We have argued it, and some questions involved in it, some four or five times in our State supreme court, and some two or three times in the Supreme Court of the United States, to say nothing of the numerous hearings in the court of common pleas for Charleston county, and we have one more argument, substantially prepared, to be delivered in the United States Supreme Court, on the final hearing there.

We have paid all our disbursements in the cause (save the printing of one argument), which have amounted to several hundred dollars in cash. These consist mainly of traveling expenses, and for printing the records and different arguments in the cause.

Now, we desire to be paid for our services rendered and to be rendered in this case to obtain possession of the Savannah and Charleston railroad out of this fund in our hands, realized from the suit of State *vs.* The South Carolina Phosphate Company. I informed you of this wish last December, as you will remember, and you expressed a wish to the same effect, if it could lawfully be done, and consulted the attorney general about it. My recollection is that his reply was a little obscure, but favorable rather than otherwise.

Mr. Stone and myself now submit to you that this is proper to be done. This money has come properly to our hands by order of court, from litigation conducted by us. You speak of it in your letter as "phosphate royalty." Let me correct this impression. The suit was not to recover royalty on phosphate rock dug and removed from North Wimbee creek by the South Carolina Phos-
112 phate Company, but for the value of phosphate rock dug, mined, and removed from said creek by said company, without authority of law. Said company claimed the phosphate rock in said creek as their own, and mined and removed it as their own, denying the right of the State to it.

The suit resulted in a decree establishing the right of the State to the phosphate rock in said creek below usual low-water mark, and the right of said company to the phosphate rock above usual low-water mark. Therefore, a decree for damages was granted for the rock dug below low-water mark only; and, considering a certain arrangement of said company, made with the grantees of the State, under the act of March, 1870, the court decreed that the said company might proceed hereafter with their mining operations upon paying the State (giving bond, etc.) the royalty of one dollar per ton upon the rock dug from that portion of the creek held to be the property of the State. This was subsequently determined by the court to be one-half of the rock in the area of the south half of the creek. This money is, therefore, simply a general fund belonging to the State as the result of litigation for damages for trespassing upon the mines of the State; and being in our hands to account for to the State, we may properly claim a set-off of our services rendered and moneys expended for the State. We hope you will concur in this view; if you do, we will submit to you a full account of services rendered and moneys expended by us in the Savannah and Charleston railroad case. The account is large, of course, but the items and details of the same are above generally stated. It is unnecessary to state it until you think it admissible, as it is quite long.

Very respectfully,

D. T. CORBIN,
For Corbin & Stone.

113 No. 23.

Letter of Corbin & Stone to Comptroller General Dunn.

STATE *vs.* SOUTH CAROLINA PHOSPHATE COMPANY.

CHARLESTON, S. C., *May* 24, 1876.

Hon. Thomas C. Dunn, comptroller general South Carolina.

SIR: In compliance with your request to our Mr. Corbin, we send you herewith copy of report of referee in regard to amount of our compensation in above case, copy of letter of Attorney General Melton in regard to same, and copy of the order of Judge Maher thereon. The originals were all sent by us to the clerk of court, Beaufort county, and were there filed by him.

Yours, respectfully,

CORBIN & STONE.

Court Common Pleas.

STATE OF SOUTH CAROLINA, *Beaufort County*:

STATE *vs.* THE SOUTH CAROLINA PHOSPHATE COMPANY, Limited, *alias* THE OAK POINT MINES.

On motion of Corbin & Stone, upon suggestion of Hon. Samuel W. Melton, attorney general, it is—

Ordered. That it be referred to Asher D. Cohen, Esq., to determine and report what per cent. of the fund collected in the above-entitled cause would be proper compensation to be paid to Messrs. Corbin & Stone for their professional services therein.

(Signed) J. J. MAHER,
Circuit Judge.

October 16th, 1875.

[NOTE.—Above order enclosed in foregoing letter of May 24, 1876, to Thomas C. Dunn, comptroller general.]

Report of Asher D. Cohen, Referee.

STATE OF SOUTH CAROLINA, *Beaufort County:*

In the Common Pleas.

THE STATE OF SOUTH CAROLINA, Plaintiff,
vs.
THE SOUTH CAROLINA PHOSPHATE COMPANY,

To the Honorable John J. Maher, judge of the said court.

I respectfully report that by an order bearing date Octo-
114 ber the sixteenth, eighteen hundred and seventy-five, it was referred to me "to determine and report what per cent. of the fund collected in the above-entitled cause would be proper compensation to be paid to Messrs. Corbin & Stone for their professional services therein." In pursuance of such order, at my request, Messrs. A. G. Magrath, Charles H. Simonton, Henry Buist, and Thomas Y.

Simons attended the reference, and gave me the benefit of their judgment in reaching a conclusion. These gentlemen have expressed their opinions in the form of statements sworn to and subscribed before me, and are filed as testimony with the report. My position throughout the case as referee has made me entirely familiar with the important questions of fact, as well as the great and subtle principles of law raised by the pleadings and lately passed upon by the court. The court is so thoroughly possessed of all matters necessary to a proper understanding and appreciation of the magnitude of the cause that it would be a work of supererogation on my part to compare it with the generality of cases raised and decided in our courts. In the conduct of the case the plaintiff's attorneys were under the necessity of finding witnesses acquainted with the peculiar facts essential to laying the foundation for the application of those legal grounds upon which the State placed its right to enjoin the defendant from an invasion of its soil without payment of the prescribed royalty. These witnesses, when found, were apart from each other and distant from the city. The great number examined by the plaintiff, as well as by the defendant, extended the cause over a long period of time, claiming and receiving the most careful attention of counsel. These references beginning in June and ending in November, 1874, the testimony as reported covers over a hundred pages of printed matter. It will be readily understood that much time, care, and high ability was required to collate the authorities and reconcile them and apply them to the case in hand. The question involved had never been passed upon in this State; hence, the duty devolved on the plaintiff's attorney demanded
115 an extraordinary amount of care, skill, and labor, as well as in preparation of the argument for this court as for the appeal court, for which latter tribunal the brief was all ready when the defendant abandoned the appeal.

I would respectfully call the attention of the court to the grounds set forth by the witnesses upon which their measure of compensation was based. They cover the entire matter, and are clearly and forcibly stated. I would bring to the notice of the court that it was only in case of success that the plaintiff's counsel could expect compensation. Their remuneration was practically contingent. In the recommendation hereinafter made I have looked beyond the mere money decree that will be entered up against the defendant. This is one of the results of success, but, in my opinion, the smallest. The other and greater benefits are in the creation of a continuous annual income to the State, and in the establishment of a precedent by which future litigation in similar causes will be prevented.

Two of the witnesses, Messrs. Simons and Buist, are of opinion that seventy-five per cent. of the amount received would be a fair and reasonable compensation. The other two, Messrs. Magrath and Simonton, deem the plaintiff's counsel should be allowed fifty per cent. of the amount to be paid to the State under the decree, exclusive of the expenditures which they have been called upon to make in the conduct of the case.

After a careful consideration, I find and recommend that sixty-

two and a half per cent. of the fund collected in this case would be a proper compensation to be paid to Messrs. Corbin & Stone for their professional services therein, this to be exclusive of disbursements as set out in their statement submitted to me, amounting to three hundred and twenty-five and $\frac{50}{100}$ dollars.

Charleston, S. C., October 28th, 1875.

(Signed) ASHER D. COHEN, *Referee.*

(NOTE.—The above report enclosed in foregoing letter of May 24, 1876, to Thomas C. Dunn, comptroller general.)

116 EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL,
COLUMBIA, S. C., *4th November*, 1875.

THE STATE *vs.* SOUTH CAROLINA PHOSPHATE COMPANY.

Messrs. Corbin & Stone, attorneys-at-law, Charleston, S. C.

DEAR SIRS: Your letter, enclosing report of Asher D. Cohen, Esq., referee, upon reference to determine what per cent. of the fund collected in the above-entitled cause would be proper compensation to be paid for your professional services therein, has been received.

In reply I have to say that I do not think it my duty to interpose objection to the confirmation of the report. The compensation has certainly been well merited, as well in view of the amount and success of the work done as in view of the ultimate result in increasing the revenue of the State.

If the General Assembly could be induced to provide adequate compensation for such services, it would, perhaps, be advisable to turn over the entire fund into the Treasury and receive payment by regular appropriation. It is idle to expect this, however, under existing circumstances.

Do me the kindness to furnish a brief statement of the case, to be incorporated in my next annual report.

Very truly yours,

SAMUEL W. MELTON,
Attorney General.

(NOTE.—The above letter enclosed in foregoing letter of May 24, 1876, to Thomas C. Dunn, comptroller general.)

STATE OF SOUTH CAROLINA, *Beaufort County:*

Common Pleas.

STATE
vs.
THE SOUTH CAROLINA PHOSPHATE COMPANY, *alias* THE OAK POINT MINES.

Ex parte CORBIN & STONE.

117 Upon hearing the report of Asher D. Cohen, in the matter of proper compensation to be paid to Corbin & Stone for services rendered on behalf of the State in the above-entitled cause, it is—

Ordered, That said report be confirmed and stand as the judgment of the court.

4th November, 1875.

(Signed) JOHN J. MAHER.

(NOTE.—The above order enclosed in foregoing letter of May 24, 1876, to Thomas C. Dunn, comptroller general.)

No. 24.

Letter of Comptroller General Dunn to Corbin & Stone.

EXECUTIVE DEPARTMENT,
OFFICE OF COMPTROLLER GENERAL,
COLUMBIA, S. C., *June* 3, 1876.

Messrs. Corbin & Stone.

DEAR SIRS: I duly received your Mr. Corbin's letter of April 15th, concerning the moneys received by you as phosphate royalty from The South Carolina Phosphate Company, Limited, *alias* The Oak Point Mines, and have delayed answering it until the present time, in order that I might give the matter such attention as its importance and character seemed to deserve.

I am sure you will believe me when I say that I thoroughly appreciate the value and efficiency of the professional services you rendered in the case of the State *vs.* that company, and that I really desire you may be fully and liberally paid for them, but I am obliged, also, to say that after a careful examination of all the papers in the case I am unable to perceive how the sixty-two and a half per cent. to be paid to you for your professional services therein can be charged or allowed on any other sum than $5,984.

I find that to be the sum which, by the final decree of the court, was ordered, adjudged, and decreed to be paid by the defendant to the plaintiff as royalty due the plaintiff upon the 5,984 tons of phosphate rock involved in the case; I also find that to be the only sum which had been determined in amount at the time your
118 rate of compensation was fixed; and I am therefore compelled to conclude it was the only sum which was or could have been in the mind of the referee when he found and recommended that sixty-two and a half per cent. of the fund collected in the case would be a proper compensation to be paid to you for your professional services therein, or which was or could have been in the mind of the court when it was ordered that the report of the referee be confirmed and stand as the judgment of the court.

It is true that the referee also reported to the court that the defendant had dug, mined, and shipped 22,016 tons of phosphate rock in addition to the 5,984 tons of phosphate rock involved in the case, and that the amount of money due by the defendant to the plaintiff on account thereof was $22,016. But the fact that this was reported after the report concerning the per cent. to be paid to you for your professional services had been made by the referree, and ordered by the court to be confirmed and stand as the judgment of the court,

and the further fact that these 22,016 tons of phosphate rock were not included in the case, and were dug, mined, and removed after the date of the cause of action in the case, seem to me to afford conclusive evidence that this $22,016 was not a subject of the sixty-two-and-a-half per cent. charge or allowance for your compensation for your professional services therein.

As to what is to be done with the moneys remaining in your hands, after deducting your sixty-two and a half per cent. on the $5,984 collected in the case, and the amount of your disbursements therein, I am unable to concour in your view that they are in your hands as a general fund belonging to the State, and that you may properly claim a set-off for the professional services you have rendered, and the moneys you have expended for the State in the case of myself, as comptroller general *vs.* The Savannah and Charleston Railroad Company.

In this case, as in other, I thoroughly appreciate the value and efficiency of the professional services you have rendered, and really desire that you may be fully and liberally paid for
119 them. I particularly desire that you may be speedily repaid the moneys you have expended in this case; but I am unable to perceive how you can properly claim, or how I can legally allow the payment of your professional services and expenses in this case out of the moneys remaining in your hands in connection with the other. I have always regarded these moneys as phosphate royalty, and still regard them as such. It is true, as you say, "the suit was not to recover royalty on phosphate rock dug, and removed from North Wimbee creek by the South Carolina Phosphate Company, but for the value of phosphate rock dug, mined, and removed from said creek by said company, without authority of law, the value of 15,000 tons of phosphate rock so dug, mined, and removed, being fixed at $90,000. But it is also true that the final decree of the court was, "that the defendant do pay to the plaintiff in the above-entitled cause the sum of $5,984, principal sum, the same being the royalty due the plaintiff upon 5,984 tons of phosphate rock, as per report, dug, mined, and removed from the bed of North and South Wimbee Creeks;" and that the referee appointed to hear and determine how many tons of phosphate rock had been dug, mined, and removed from the bed of North Wimbee creek, below the usual low-water mark by the defendant company, in addition to the 5,984 tons of phosphate rock reported cleared to October 1, 1873, and also to determine and report the amount of royalty due by the defendant to the plaintiff, on account of said phosphate rock so dug, mined, and removed, determined and reported to the court that the amount of phosphate rock so dug, mined and removed was 22,016 tons, and that the amount of money so due was $22,016; which report of the referee was ordered and adjudged to be confirmed and stand for the judgment and decree of the court, thus showing that although the suit was brought for $90,000 in damages for digging, mining, and removing 15,000 tons of phosphate rock, being at the rate of $6 per ton, its full gross value, yet the judgment and decree of the court was for $5,984 royalty on the

5,984 tons of phosphate rock involved in the case, and for
120 $22,016 royalty on 22,016 tons of phosphate rock not involved in the case, the whole being at the rate of $1 per ton, the uniform royalty fixed by law.

In view of these facts I am compelled to regard the moneys remaining in your hands as Phosphate royalty belonging to the State, and as such I have no right or authority to consent that they shall be held or taken by you for the payment of your professional services and expenses in the suit to recover possession of the Savannah and Charleston railroad.

I have, therefore, to respectfully request and demand that after deducting your 62½ per cent. on the $5,984 collected in the case, and your disbursements, amounting to $325.50, you will pay over to the State treasurer the remainder of the moneys received by you as royalty from the South Carolina Phosphate Company, limited, alias the Oak Point Mines, amounting to $23,814.50.

I shall be glad to have an early reply to this communication, and am, very respectfully,

THOMAS C. DUNN,
Comptroller General.

No. 25.

Letter of D. T. Corbin, for Corbin & Stone, to Comptroller General Dunn.

CHARLESTON, S. C., *June* 7, 1876.

Hon. Thomas C. Dunn,
Comptroller General South Carolina:

DEAR SIR: Your letter of June 3, 1876, in reply to a letter from this office of April 15, 1876, is received. It is more than a surprise.

It is a matter of serious regret that you have so thoroughly misapprehended both the facts and the law of the matter, and hence inevitably come to an erroneous conclusion.

As soon as the press of other business will permit, I will
121 answer your letter and set you right, first, as to the facts, and then as to the law; till then be kind enough to suspend further judgment.

Respectfully,

D. T. CORBIN,
For Corbin & Stone.

No. 26.

Letter of D. T. Corbin, for Corbin & Stone, to Comptroller General Thomas C. Dunn.

CHARLESTON, S. C., *June* 17, 1876.

Hon Thomas C. Dunn, Comptroller General, Columbia, S. C.

DEAR SIR: Your letter of June 3d, 1876, was received some days since, as heretofore acknowledged, but other business engagements have deprived me of time to answer till now.

The conclusion you have reached is so surprising to me, and, in

my judgment, so erroneous that I must rehearse somewhat fully the history of the case State *vs.* The South Carolina Phosphate Company, to show you that you have misapprehended not only the facts, but the law of the case.

The South Carolina Phosphate Company was mining and removing from the bed of North Wimbee creek the phosphate rock, and claimed the right to do so on the ground of riparian proprietorship and the non-navigability of said creek. The State, on the contrary, claimed that the phosphate mine or deposit was the property of the State, and on the ground that North Wimbee creek was a public navigable stream, within the ebb and flow of the tide; that the soil, and, consequently, all mines therein, in such a stream was the property of the State. You will perceive that the real point of the controversy was as to the title to the phosphate deposit in the bed of said creek.

The proceedings taken to determine this question were the natural and necessary ones, and in accordance with the facts stated.

An information on behalf of the State was filed in the court
122 of Beaufort county against said company, alleging, (1) that said company had intruded upon the property of the State by mining and removing from the bed of said stream fifteen thousand tons of phosphate rock, of the value of ninety thousand dollars; (2) that said company was engaged in and intended to continue the business of mining and removing phosphate rock from the bed of North Wimbee creek without permission from the State. And the information prayed judgment against said company for ninety thousand dollars, and a perpetual injunction restraining said company from mining and removing the phosphate rock from the bed of said stream.

At the same time the summons and complaint were served on the defendants there was served notice of a motion for a preliminary injunction to restrain said company from mining and removing said phosphate rock in said stream pending the litigation. This motion was a proper one, but, in reply to it, the defendant showed that the business had been going on two or three years, and that a large amount of capital was invested, and great injury would result from stoppage, and offered to secure the State from all damage, if allowed to proceed with mining operations, in the event of its being determined ultimately that the company had not good right and title to mine, &c. This offer of the defendant was fair and just, under the circumstances, and in accordance with law. The matter was submitted to the court, and an order taken accordingly allowing the company to proceed with its mining operations, but requiring the execution of a bond in the sum of ($50,000) fifty thousand dollars to save the State harmless therefrom, and that said bond be filed of record in the cause with the clerk of court subject to the order of the court. This bond was duly executed by the company and filed, as required, and the mining operations of the company proceeded as usual.

The cause proceeded. It was referred to Asher D. Cohen, as referee, to report generally, and to report any special matter. In

June, 1874, the referee reported. This report is, in substance:
123 That the State, by an act of March 1, 1870, had given certain persons named, and such persons as they should associate with them, the right, on certain conditions, to mine and remove phosphate rock from the beds of the navigable streams of the State. That those parties had complied with the conditions of the act, and on the fourteenth day of March, 1870, had associated the defendant company in this case with themselves in the privileges of said act, with the right to defendant company to mine and remove the phosphate rock within certain boundaries in North and South Wimbee creeks, upon the terms and conditions of said act. The defendants, however, had been careful in said instrument of association to assert that they had the right to mine the phosphate rock by virtue of riparian proprietorship. That they asserted the same now because the creeks were not navigable streams; but, if found navigable, the company claimed the protection of its said association with the grantees under the act of March, 1870.

The referee further reported that the defendant company claimed, if North Wimbee creek was navigable, their riparian and proprietary rights extended to low-water mark; and he reported that the defendant company had dug, mined, and removed from the bed of North Wimbee creek, within the boundary lines mentioned, below usual low-water mark, five thousand nine hundred and eighty-four tons of phosphate rock, and there was due the State on said rock five thousand nine hundred and eighty-four dollars, if said creek was a navigable stream.

The referee further reported that said company had dug, mined, and removed from the bed of said stream, between usual high and low water marks, four thousand two hundred and thirty-seven tons of phosphate rock; that if, by virtue of riparian proprietorship, the defendant company had a right to dig this rock, then nothing was due the State on account of it; but if it had no such right, then there was due the State on account of it the sum of four thousand two hundred and thirty-seven dollars.

124 The referee finally reported for the determination of a jury, under the direction of the court, the question, "Is North Wimbee creek a navigable stream?"

This report was adopted by the court only in part, viz., as to the facts found; and it was again referred to the referee to report upon the remaining questions of fact. This reference involved the ascertainment of the facts relative to North Wimbee creek, which, in law, made or did not make it a navigable stream. These references ran through many months, and resulted in a voluminous report, with the testimony.

The facts ascertained from the report and testimony being fully argued before the court, upon consideration thereof, the court held (1) "that North Wimbee creek was a public navigable stream;" (2) that the defendant company had good title to the lands therein between usual high and low water marks, and (3) the State had title to the bed of said creek below usual low-water mark, and that the State was entitled to a judgment in conformity to this decision.

This opinion having been rendered on July 12, 1875, a decree was entered that the defendant do pay the plaintiff the sum of $5,984, as per report, and that plaintiff do have execution therefor.

It was further ordered that the defendant company be restrained from mining the phosphate rock from that part of the bed of North Wimbee creek opposite to and adjoining the lands of the defendant and the centre of said stream, below usual low-water mark, until said defendant company shall file in the office of the comptroller general of the State a bond, in the penal sum of fifty thousand dollars, conditioned and approved and renewable according to the provisions of section 5 of the act of March 1, 1870.

On the same day that this order was granted, July 12, 1875, another order was granted, for the purpose of ascertaining the amount of phosphate rock that had been mined by the company pending the litigation, and for which a bond had been required by the court and given by the defendant. The order is as follows:

"The defendant in the above-entitled cause, having exe-
125 cuted its bond in the penal sum of fifty thousand dollars, conditioned to pay royalty, &c., if, in the ultimate determination of said cause, they shall be bound to do so, and said bond having been filed in this court, it is—

"Ordered, That it be referred to Asher D. Cohen, &c., to hear and determine how many tons of phosphate rock have been dug, mined, and removed from the bed of North Wimbee creek, below usual low-water mark, by the defendant company, in addition to the five thousand nine hundred and eighty-four tons of phosphate rock reported cleared to October the first, 1873; also, to determine and report the amount of royalty in money due by the defendant to the plaintiff on account of said phosphate rock so dug, mined, and removed."

Under this order the references proceeded, some time in October, 1875. It should be here stated that the defendant company gave notice of appeal to the supreme court, November term, 1875, from the decree of Judge Maher of July 12, 1875, and hence all further proceedings under that decree for the collection of the money due thereunder were stayed.

It was intimated to me, some time in October, by the defendant's counsel, that the defendant had determined not to press the appeal. There being a term of court in session at Beaufort where the cause was pending, and about to adjourn, upon the suggestion of the attorney general I took an order referring it to Asher D. Cohen "to determine and report what per cent. of the fund collected in the above-entitled cause would be proper compensation to be paid to Messrs. Corbin & Stone for their professional services therein." This order was dated October 16, 1875.

It will be noticed that at this time there had been no "fund collected in the above-entitled cause," and hence nobody had or could have any reference to such a fund, but to the fund to be collected. On the other hand, there had been two distinct funds provided for by orders of the court, four months before—one for the rock dug
below usual low-water mark prior to proceedings in the cause,
126 and the other for the rock dug in same place pending proceedings in the cause.

The first was ascertained in amount, but stayed in payment by appeal; the second was at reference to fix amount.

The referee, in his report under the order of October 16, 1875, says, after stating some of the considerations that govern him in his conclusions:

"In the recommendation hereinafter made I have looked beyond the mere money decree that will be entered up against the defendant. This is one of the results of success, but, in my opinion, the smallest. The other and greater benefits are in the creation of a continuous annual income to the State, and in the establishment of a precedent by which future litigation in similar causes will be prevented. Two of the witnesses, Messrs. Simons and Buist, are of opinion that seventy-five per cent. of the amount received would be a fair and reasonable compensation; the other two, Messrs. Magrath and Simonton, that the plaintiff's counsel should be allowed fifty per cent. of the amount to be paid to the State under the decree, exclusive of the expenditures which they have been called upon to make in the conduct of the case.

"After a careful consideration, I find and recommend that sixty-two and a half per cent. of the fund collected in this case would be a proper compensation to be paid to Messrs. Corbin & Stone for their professional services therein—this to be exclusive of the disbursements as set out in their statement submitted to me, amounting to three hundred and twenty-five $\frac{50}{100}$ dollars."

This report is dated October 28, 1875, and was submitted to the court on November 4, 1875, whereupon it was ordered "that said report be confirmed and stand as the judgment of the court."

Now, please to note that at the time this "report" was made, and at the time it was confirmed, there had been no final decree made in the cause, and no money collected in the cause. The report, impliedly, if not in terms, recognizes this fact, and the judgment of the court adopting the report as its judgment recognizes it.

127 The language of the report here referred to is: "In the recommendation hereinafter made I have looked beyond the mere money decree that will be entered up against the defendant." The referee does not say he looks beyond the decree that has been entered up, but beyond the decree that will be entered up in the recommendation made.

If, therefore, the referee or the judge can be supposed to have had anything in mind about the cause, it must be supposed that they remembered the decree of July 12, 1875, for rock dug prior to suit, and the order taken at the same time to fix the amount due for rock allowed in the cause to be dug pending the suit, and which last matter was in this same referee's hands at the time he made this report. When, therefore, he said "in the recommendation hereinafter made I have looked beyond the mere money decree that will be entered" he spoke accurately and in accordance with the facts, which he well knew.

On November 9, 1875, the referee made his final report, under the order of reference of July 12, 1875. This report says "that twenty-two thousand and sixteen tons is the amount which the defendants

have dug, mined, and shipped and have on hand from the first of October, A. D. 1873, to October 1st, 1875, taken from below usual low-water mark. * * * This 22,016 tons is in addition to the 5,984 tons heretofore reported cleared to October 1st, 1873. * * * I also determine and report that the amount of money due from the defendant to the plaintiff on account of said phospate rock so dug, mined, and removed is twenty-two thousand and sixteen dollars."

On the 11th of November, 1875, this report was submitted to the court, and confirmed, and ordered to stand as the judgment and decree of the court. And it was further ordered that the defendant pay to Corbin & Stone, counsel for plaintiff, the sum of twenty-two thousand and sixteen dollars, the amount stated in the report to be owing by defendant from October 1, 1873, to October 1, 1875; and that upon the payment to them of the same, and of the fur-
128 ther sum of five thousand nine hundred and eighty-four dollars, the amount heretofore adjudged to be owing by the defendants (which last payment the defendants are hereby authorized to make to Messrs. Corbin & Stone), the defendants be discharged and released from all further account and liability for claims in this cause to the first of October, A. D. 1875.

Here is the final decree which, for the first time, determined the amount of money to be collected in the cause. No money was or could be collected till after this was entered. This must be clear to laymen as well as lawyers. This is the decree to which the referee's report on compensation to be paid to Corbin & Stone clearly pointed. It cannot, by any proper construction of the language used, be made to refer to any other.

In this connection, attention is specially called to the language used in the order of reference, which utterly precludes the idea that the decree of July 12, 1875, for $5,984, is referred to, and the same language again used in the referee's report, viz: "The per cent. of the fund collected in the cause." It is not the amount of money decreed in the cause, of which Corbin & Stone are to have a per cent. for their professional services, but a per cent. of the fund collected.

It was this the referee was to inquire about; it was this he did inquire about; it was this he reported about, and it was this that was confirmed. The "amount decreed" and the "amount collected" in a cause are frequently very different amounts, and the two words "decreed" and "collected" never were and never can be used synonymously.

Had but half the amount "decreed" been "collected," could Corbin & Stone have claimed that the percentage allowed them was upon the face of the decree? Would not such a claim have been too absurd for a moment's serious consideration, or even for argument? I think so. The word "collected" was well chosen in the order of reference and in the referee's report, and, in its connection, has no doubtful signification.

129 This statement of facts and this history of the cause (much of which I suppose must have escaped your attention), will

make apparent to you how far you have misapprehended matters. The grounds of your "conclusions" entirely melt away before these facts. Your grounds stated are two. You say, "I find that to be the sum ($5,984) which, by the final decree of the court, was ordered, adjudged, and decreed to be paid by the defendant to the plaintiff upon the 5,984 tons of phosphate rock involved in the case. I also find that to be the only sum which had been determined in amount at the time your rate of compensation was fixed; and I am therefore compelled to conclude it was the only sum which was or could have been in the mind of the referee when he found and recommended that sixty-two and a half per cent. of the fund collected in the case would be a proper compensation to be paid to you, &c." Now, your errors in this remark quoted are three: (1) that there were but "5,984 tons of phosphate rock involved in the case;" whereas there was involved in the cause all the phosphate rock dug by the defendant company prior to suit and during the pendency of the suit, as hereinbefore shown you, which is 28,000 tons; and your second error is that the decree for $5,984 on the 5,984 tons of phosphate rock was "the final decree of the court;" whereas this decree of July 12, 1875, was not "the final decree" in the cause. It was "final" only in the sense that it ascertained the amount of money to be paid by the defendant on account of the 5,984 tons of phosphate rock, which, as shown, was but a part of the rock comprehended by the case. "The final decree in the cause" was the one of November 11, 1875, which ascertained the whole amount of rock involved in the cause, and the whole amount of money to be paid on account thereof, and ordered the same to be paid over. This decree specially referred to the 5,984 tons of phosphate rock and the money therefor adjudged to be owing for the same, and directed that amount also to be paid over.

Your third error is that this decree for $5,984, of July 12,
130 1875, "being the only sum determined in amount at the time your rate of compensation was fixed, * * * was the only sum which was or could have been in the mind of the referee when he found and recommended that sixty-two and a half per cent. of the fund collected in the case would be proper compensation to be paid," &c.; whereas said referee did not refer to the amount decreed in the cause at all, but the amount collected, and that expressly collected under a decree "that will be entered up against the defendant."

Now, that these are three errors I think is beyond controversy, and I think you will not fail to see them to be such.

Your second ground for your "conclusions," a second time directly and distinctly stated, and therefore woven firmly into your mind and argument, is this: "That these 22,016 tons of phosphate rock were not included in the case;" and your apparent reason for saying this seems to be because these 22,016 tons of phosphate rock "were dug, mined, and removed after the date of the cause of action in the case."

This is error entirely on your part. These 22,016 tons of phosphate rock were dug by the defendant, under express permission of the court, during the investigation and determination of the question of title to the deposit, and after a bond given in the sum of

$50,000 and filed in court, subject to the order of the court, conditioned to pay on account of rock dug if it should be determined that the defendant had no right to dig it. [NOTE.—This bond was not filed in the office of the comptroller general of the State for him to enforce.] The court did not, and could not, require such a bond from the defendant then for that purpose. The right of the defendant was undetermined, and a provisional bond, subject to future determinations in the cause, was all that could be taken. That was taken and kept by the court in the cause; and when the rights of both parties were determined in the phosphate deposit, then it turned out that the company must pay on account of the phosphate rock dug during the litigation, and for which the
131 bond required by the court was given. The very day, as before shown, on which the court determined the rights of the State and the company it (July 12, 1875,) ordered the referee to investigate and report how many tons of phosphate rock had been dug in addition to the amount first reported—that is, the amount mined pending the litigation, under permission of the court, and to be accounted for to the court, and for the payment of which the court held a bond.

The amount thus dug by the defendant was reported upon as soon after as possible it was decided by the defendant not to prosecute his appeal. The fact that the report was made after the report of "percentage of money collected in the cause to be paid Corbin & Stone for their professional services," can make no difference. This 22,016 tons of rock was a part of the cause as much as anything done in the cause was a part of it. At any rate, the defendant so thought and acted and so did the court. The money on account of this rock was finally decreed by the court to be paid, and, pursuant to the decree, it has been paid; and without the final decree of the court, embracing it, no money has been paid. It is, therefore, quite as correct for you to say "there has been no case at all" as it is to say this final decree for $22,016 on account of this 22,016 tons of phosphate rock, and embracing it, is not a part of it.

This is sufficient on this head. I have written fully that there should be no further misapprehensions on your part. My conclusion is unalterable—that the percentage allowed Corbin & Stone is upon the "amount collected in the cause," and that amount was twenty-eight thousand dollars principal sum, and costs two hundred and thirty-five $\frac{7}{100}$ dollars. In addition to this percentage they receive back their cash disbursements in the cause, fixed by the referee at $325.50.

Now, as to the second part of your letter, as to whether, of the balance in the hands of Corbin & Stone of the above moneys,
132 they shall pay it over to the State, or shall be allowed a set-off against the same of their claim against the State for professional services rendered the State in the case of Comptroller General *vs.* The Savannah and Charleston Railroad Company.

Upon this head I repeat what I have said in my former letter. This money was sued for and collected as damages for intrusion by the South Carolina Phosphate Company upon the property of the

State. The fact that said company, after having exhausted and been overruled in their claim of right to said phosphate mine, on the ground of riparian proprietorship, were compelled to take shelter under an association with the grantees of the State, under the act of March 1, 1870, and, under that association, had a qualified right to mine said phosphate rock, can make no difference with this question. The company did not dig this rock under that act or that association at all, because they had never complied with any of the conditions of that act, which gave them the right to dig, viz: Given the bond required as a condition precedent to mining, nor made the returns or paid the royalty by the ac required at the end of the year.

The company, on the other hand, claimed that they were digging the phosphate rock under their own right, independent of the rights that flowed from association with the grantees of the State. The court overruled this claim and decreed against them, and the measure of damages was fixed against them at one dollar per ton for the phosphate rock dug, the same amount that they should have paid the State had they been mining under the act of March 1, 1870. That royalty named in the act was adopted as a mere measure of damages in this case. Any other might have been adopted by the court with propriety.

Now, the "phosphate royalty," as it is termed in the various appropriation acts, and referred to by them, is the one dollar per ton paid by the companies who are and have been mining the phosphate rock in the beds of the navigable streams, under the conditions and provisions of the act of March 1, 1870, and who
133 have, therefore, given the bond by that act required, made the returns by that act required, and paid the money, or are to pay it, to the State treasurer, as required by that act. You have no right, therefore, to say, as you do in your letter, that you regard this money as "royalty," in the technical sense of the appropriation acts. Should a suit be brought upon the bonds of any of said companies mining under said act of March 1, 1870, or direct against the companies for royalty due and unpaid, and a recovery should be had accordingly and the money collected, then that money might properly be considered "royalty" on phosphate rock, in the sense of the acts of the Legislature. But that is not this case. The Legislature did not, and could not, appropriate the proceeds of this suit until the same was collected and paid into the treasury. It is, therefore, in the hands of Corbin & Stone, to be accounted for by them. They have a just and valid claim (as admitted and appreciated by you) against the State, for services rendered in the attempt of the comptroller general (yourself and your predecessor) to enforce the rights of the State against the property of the Savannah and Charleston Railroad Company. They have a right to demand that their services in that suit, and the moneys they have expended in behalf of the State in that suit, shall be set off against the claim of the State on the moneys in their hands. I will not do more than cite you to some authorities upon this point: See United States *vs.* George Macdaniel, 7 Peters, 1; United States *vs.* Eleazer W. Ripley, 7 Pet., 18; United States *vs.* Thomas Fillebrown, 7 Pet., 28. See also *in re* Paschal, 10 Wallace,

pages 492 and 493. These are all opinions of the Supreme Court of the United States, and on perusal of them, I think you will find that my demand for a set-off is just and would be sustained by any court. If you do find this is so, I know it will give you pleasure, as you have so expressed yourself to me; and you have also said the same thing in a letter to the late Attorney General Melton, written at my suggestion and upon this very question. The services of Corbin & Stone
(mostly rendered by Corbin) in the Savannah railroad case
134 have been very great; the cause is a large one and the amount involved is large, and the services have been rendered in great part in the Supreme Court of the State and of the United States, and the charges for these services are proportionately large. The cost of the suit has been large and the expenses of counsel have been large, and all have been borne by Corbin & Stone. The State has not paid a cent, or made any provision, that I am aware of, to pay anything to counsel for services in the cause. Corbin & Stone will, therefore, hold the moneys in their possession belonging to the State subject to their claim for services rendered the State in the matter of the Savannah and Charleston Railroad case.

I have the honor to be, very respectfully, your obedient servant,

D. T. CORBIN,
Of Corbin & Stone.

No. 27.

Letter of Comptroller General Dunn to Corbin & Stone.

EXECUTIVE DEPARTMENT,
OFFICE OF COMPTROLLER GENERAL,
COLUMBIA, S. C., *July 6th*, 1876.

Messrs. Corbin & Stone, Charleston, S. C.

GENTLEMEN: Yours of the 17th ult. was duly received, and has had my most earnest attention.

After carefully weighing all you state regarding the law and facts, my opinion remains unchanged—that of the moneys received by you for and on account of the State from the South Carolina Phosphate Company you can only retain in your hands, as compensation for your legal services in that case, sixty-two and a half per cent. on the $5,984, and not upon the royalty subsequently paid. According to your reasoning, it seems to me you would claim to be entitled to 62½ per cent. on all the royalty that the South Carolina Phosphate Company may ever pay to the State.

135 I cannot deem it otherwise than my official duty to insist that you pay over to the State treasurer all of the moneys collected by you from the South Carolina Phosphate Company except the 62½ per cent. on $5,984; and as, from your letter of the 17th ult., you decline to do so, for reasons therein stated, I shall feel obliged to appeal to the courts on behalf of the State.

Yours, respectfully,

THOMAS C. DUNN,
Comptroller General.

No. 28.

Letter of Corbin & Stone to Comptroller General Thomas C. Dunn.

CHARLESTON, S. C., *February 1st*, 1877.

Hon. Thomas C. Dunn, comptroller general South Carolina, Columbia, S. C.

DEAR SIR: Referring to previous correspondence we have had with you relative to the construction of the order of Judge Maher in the case of The State against The South Carolina Phosphate Company, *alias* The Oak Point Mines, we now would respectfully request that you reconsider the question with a view to finally determining the matter.

We would also ask you to examine the accompanying account for services rendered in the case of Daniel Hand *vs.* The Savannah and Charleston Railroad Company. These services were first requested by your predecessor, and, at your special request, the litigation then begun has been carried on by us, until the matter is now before the Supreme Court of the United States.

We have received no compensation whatever in this case, but, on the other hand, have necessarily expended a considerable sum for traveling expenses, printing, and the like. We think we have an indisputable right to retain, out of moneys in our hands, a sufficient sum to pay this account.

In support of this view we would refer you to the following authorities, viz:

United States *vs.* McDaniel, 7 Pet., 1.
United States *vs.* Ripley, 7 Pet., 18.
136 United States *vs.* Fillebrown, 7 Pet. 28.
In re Paschal, 10 Wall., pp. 492–3.
United States *vs.* Buchanan Crabbe, 563.

Yours, very respectfully,

CORBIN & STONE.

(Note.—Account of Corbin & Stone with State enclosed in letter of February 1, 1877, to Comptroller General Dunn.)

State of South Carolina, by Hon. Solomon L. Hoge, comptroller general, to Corbin & Stone, DR.

1875.			
March 1.	To retaining fee in case to obtain possession under statute of Savannah and Charleston railroad	$1,000	00
	To preparation of petition and filing same in case of Daniel Hand *vs.* Savannah and Charleston Railroad Company, and taking order to show cause, &c.	550	00

State of South Carolina, by Hon. Thomas C. Dunn, comptroller general.

April 2.	To preparation and argument in matter of taking possession of the Savannah and Charleston railroad, before court common pleas for Charleston county	500 00
May	To preparation and argument before State supreme court of case You *in re* Daniel Hand *vs.* Savannah and Charleston Railroad Company *et al.* (Decree in your favor.)	1,000 00
June 14.	To giving notices and argument of motion in case You *in re* Daniel Hand *vs.* Savannah and Charleston Railroad Company *et al.*, to enforce decree of supreme court in your favor before court of common pleas	150 00
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July 2.	To preparation of record and appeal in case You *in re* Daniel Hand *vs.* Savannah and Charleston Railroad Company from decision of Judge Reed refusing to enforce decree of State supreme court	100 00
July 15.	To motion made in supreme court and argument of same to docket and have heard the appeal from decision of Judge Reed in case You *in re* Daniel Hand *vs.* Savannah and Charleston Railroad Company	250 00
July 23.	To preparation of printed argument in case You *in re* Daniel Hand *vs.* Savannah and Charleston Railroad Company and delivering same before the supreme court at Columbia	500 00
July 23.	To cash paid expenses to Columbia and return	23 90
July 23.	To preparation, in printed form, proceedings against Mitchell, receiver, and advisory board of Savannah and Charleston Railroad Company for contempt, and presenting same with argument before supreme court	250 00
Sept. 20.	To cash paid telegram from Wilkes about record in case You *in re* Daniel Hand *vs.* Savannah and Charles railroad	95
Nov. 8.	To going to Columbia to obtain certificate of clerk of supreme court relative to completeness of record in case You *in re* Daniel Hand *vs.* Savannah and Charleston railroad, filed in Supreme Court United States, for use at Washington	100 00

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Nov.	15.	To preparation of printed argument and submitting same to Supreme Court United States, at Washington, in case You *in re* Daniel Hand *vs.* Savannah and Charleston railroad (three weeks in Washington)	2,500 00
Nov.	15.	To cash paid expenses	50 00
Nov.	15.	To cash paid T. J. D. Fuller, attorney at Washington, for services in said case	100 00
Nov.	27.	To cash paid Edward Perry for printing records and arguments in case You *in re* Daniel Hand *vs.* Savannah and Charleston Railroad Company *et al.*	148 75
1876.			
Jan.	4.	To printed argument prepared and submitted to Supreme Court United States in reply to second argument of Phillips in case You *in re* Hand *vs.* Savannah and Charleston railroad	500 00
April	3.	To preparation of notice of motion to advance on docket case You *in re* Hand *vs.* Savannah and Charleston railroad; preparing and printing elaborate affidavit of Courtenay as evidence on said motion; preparing printed argument on same and submitting it to United States Supreme Court in person, at Washington, D. C.	1,500 00
April	10.	To attendance on United States Supreme Court from April 3d to April 10th, waiting to argue case You *in re* Hand *vs.* Savannah and Charleston railroad, if same was advanced, as was believed same would certainly be	700 00
April	10.	To cash paid expenses	100 00
April	17.	To cash paid Edward Perry for printing affidavit of Courtenay *in re* Hand *vs.* Savannah and Charleston railroad	18 00

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April	17.	To cash paid Edward Perry for printing brief of argument on motion to advance case You *in re* Daniel Hand *vs.* Savannah and Charleston railroad	15 00
			$10,056 60

Per Contra—Credit.

In our hands to credit of comptroller general (see letter to Thomas C. Dunn, April 15, 1875, letter-book, p. 205)	10,262 66
Balance due State	$206 06

No. 29.

Letter of Comptroller General Thomas C. Dunn to Corbin & Stone.

COMPTROLLER'S OFFICE,
COLUMBIA, S. C., *February* 10, 1877.

Messrs. Corbin & Stone, attorneys-at-law, Charleston, S. C.

DEAR SIRS: In reference to the claim made by me heretofore upon you for the money recovered and received by you on behalf of the State in the case of the State and The South Carolina Phosphate Company *alias* The Oak Point Mines, I have to say that I have given much consideration to your reply and the facts to which you call my attention contained in the history of the case.

I have only desired to be right and to guard, as I am bound to do, the interests of the State.

On reflection and advice I have to inform you that I abandon the claim heretofore made on you on account of my construction of the decree for compensation, and yield to your construction of that decree of the court in that regard. As to your claim for professional services rendered in the case of "Comptroller General of South Carolina against The Savannah and Charleston Railroad Company," I think you are justly entitled to the same, and your account submitted is approved by me. This approval is given with the understanding that you shall conduct the suit to conclusion in the United States Supreme Court without further charge in that behalf.

Very respectfully, yours,

THOS. C. DUNN,
Comptroller General of South Carolina.

No. 30.

Letter of Corbin & Stone to Comptroller General Thomas C. Dunn.

CHARLESTON, S. C., *March* 5, 1877.

Hon. Thos. C. Dunn, comptroller general South Carolina, Columbia, S. C.:

DEAR SIR: Yours of the 10th ult. has been received, wherein you allow our account for services in the Savannah and Charleston railroad case, now before the Supreme Court of the United States, amounting to $10,056.60, on condition that we shall conduct the suit in said Court to conclusion, without further charge in that behalf.

The amount in our hands to the credit of the State, as per our letter to you of April 15, 1876, is $10,262.66.

There remains due the State, therefore, from us, the sum of $206.06. To whom shall we send check for this balance—you or Mr. Cardozo? Will send it at once.

Yours, very respectfully,

CORBIN & STONE.

No. 31

Letter of Comptroller General Dunn to State Treasurer Cardozo, Certifying Settlement with Corbin & Stone and Balance, $206.06, Due State.

STATE OF SOUTH CAROLINA,
OFFICE OF COMPTROLLER GENERAL,
COLUMBIA, *March* 8, 1877.

Hon. F. L. Cardozo, State treasurer.

SIR: By the settlement this day made by Messrs. Corbin &
141 Stone in the case of the Oak Point Mining Company, they are indebted to the State of South Carolina a balance amounting to two hundred and six $\frac{6}{100}$ dollars, which amount you will please collect from them.

Respectfully,

THOMAS C. DUNN,
Comptroller General.

No. 32.

Letter of S. L. Leaphart to Corbin and Stone.

EXECUTIVE DEPARTMENT,
OFFICE OF STATE TREASURER,
COLUMBIA, *June 9th*, 1877.

Messrs. Corbin & Stone, Charleston, S. C.

GENTLEMEN: Yours of the 7th, with check of D. T. Corbin for $206.06, has been received. We enclose duplicate receipts for same.

Very respectfully,

S. L. LEAPHART,
State Treasurer,
Per LAVAL, *Assistant.*

Enclosed in Foregoing Letter.

(Original.)

No. 2630.

STATE TREASURY OFFICE,
COLUMBIA, S. C., *9th June*, 1877.

Received of Messrs. Corbin & Stone, attorneys, on account of State *vs.* South Carolina Phosphate Company, Limited, two hundred and six $\frac{6}{100}$ dollars.

S. L. LEAPHART,
State Treasurer.

$206.06.

No. 33.

Letter of Comptroller General Hagood to Corbin & Stone.

EXECUTIVE DEPARTMENT,
OFFICE OF COMPTROLLER GENERAL,
COLUMBIA, S. C., *5th June*, 1877.

Messrs. Corbin & Stone.

GENTLEMEN: I find in my office a letter from you to Mr.
142 Dunn, in regard to fees for services in a matter of the Savannah and Charleston railroad, which were deducted out of moneys in your hands, the result of previous lawsuits.

As I see no other record of the transaction I would be obliged if you will furnish me, as early as possible, a statement of your connection with these cases, by whose authority you acted, and what arrangements were made in regard to your fees, and what amount was received for the use of the State.

Respectfully,

JOHNSON HAGOOD,
Comptroller General.

No. 34.

Letter of Corbin & Stone to Comptroller General Hagood.

CHARLESTON, S. C., *June* 8, 1877.

Hon. Johnson Hagood, comptroller general South Carolina.

DEAR SIR: Your letter of June 5th is received. It is with regret that we learn that your records are defective as to the subject-matter of your inquiry. The suits conducted by us for the State during the period from 1871 to 1876 have been fully and elaborately reported to the proper officers of the Government and our accounts closed. The moneys collected by us have been fully accounted for to your office, and the small balance in our hands on settlement has been transmitted to the treasurer. We held and now hold comptroller general's warrants on the treasury, but we understand they will not be paid if presented at the treasury. Under these circumstances it does not seem to us that we should be called upon to restate "our connection with these causes, under whose authority we acted, what arrangements in regard to our fees, and what amount was received for the use of the State;" to do so would require of us much time and labor; and to what good?

Besides we have not the slightest doubt that your office contains a full record of the whole business, and that you will be able to discover it on a further and fuller examination.

143 There is a further reason at this time why we cannot accommodate you in the labor of perfecting the records of your office, viz: Our senior, Mr. Corbin, who had charge of all the State's business, and heretofore reported it, is just on the eve of leaving the State, to be absent several months in the North and in Europe, and

he cannot attend to it, and our junior, Mr. Stone, from lack of accurate information and pressure of other business, cannot do it.

Very respectfully,

CORBIN & STONE.

No. 35.

Letter of Attorney General Connor to Corbin & Stone.

EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL.
COLUMBIA, S. C., *August* 9, 1877.

Messrs. Corbin & Stone, attorneys-at-law.

GENTLEMEN: I am instructed to request settlement of the balance due by you to the State, amounting to $24,260, with interest at 7 per cent. from the 11th November, 1875, and, in the event that a satisfactory adjustment is not made at an early date, I am instructed to bring suit on behalf of the State for said amount.

Trusting that the claim may be adjusted without the necessity of legal proceedings, I am,

Yours, respectfully,

JAMES CONNER,
Attorney General.

No. 36.

Letter of William Stone, of Corbin & Stone, to Attorney General Conner.

GREENVILLE, S. C., *August* 13, 1877.

Gen. James Conner, attorney general South Carolina, Columbia, S. C.

SIR: I am greatly surprised at the receipt of your letter of the 9th inst. addressed to Corbin & Stone and directed to me here,
144 wherein you request settlement of balance you stated to be due by our firm to the State, amounting to $24,260. You do not say on what account this request is made, and I am confident there must be some mistake about it, as our firm is not indebted to the State, so far as I am aware, in any sum whatever.

Yours, very respectfully,

WILLIAM STONE.

No. 37.

Letter of Attorney General Conner to William Stone, of Corbin & Stone

EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL,
COLUMBIA, S. C., *August* 17, 1877

Hon William Stone.

DEAR SIR: Yours of the 13th to hand this morning.

The claim is for the balance of the sum of $28,000 received by your firm on the judgment in State *vs.* Oak Point Mines. Out of that sum of $28,000 only $206.06 has been paid over to the State.

The comtroller general, some time ago, wrote your firm in regard to the matter, and received a very unsatisfactory reply from your firm, and the claim was then placed in my hands for suit.

Yours, very respectfully,

JAMES CONNER,
Attorney General.

No. 38.

Letter of William Stone, of Corbin & Stone, to Attorney General Conner.

GREENVILLE, S. C., *August* 21, 1877.

Gen. James Conner, attorney general, Columbia, S. C.

DEAR SIR: Yours of the 17th is just at hand, wherein you state that the claim made upon the firm of Corbin & Stone in your former letter was for the balance of the sum of $28,000 received by it
145 on the judgment in the case of the State against The Oak Mines. The management of that case was in the hands of Mr. Corbin, who is now abroad. He will probably return in October, and he can explain, more fully than I, our firm's position in the matter. There was some correspondence with the comptroller general (Dunn) in regard to the money collected in the case referred to; but the matter was closed, according to my understanding, by his allowing our claims for services rendered him, officially, in the case of *ex parte* Dunn, comptroller general, against The Savannah and Charleston Railroad Company. The balance due from us was paid over, as will appear, I think, by the check sent by Mr. Corbin to State Treasurer Leaphart. I have not the papers in the case here, but I think the comptroller general will find the evidences in his office, and they will show that the State has no claim upon us in the matter.

Yours, very respectfully,

WILLIAM STONE.

No. 39.

Letter of Comptroller General Hagood to Corbin & Stone.

STATE OF SOUTH CAROLINA,
OFFICE OF THE COMPTROLLER GENERAL,
COLUMBIA, 11*th August*, 1877.

Messrs. Corbin & Stone attorneys-at-law.

GENTLEMEN: I am informed that your firm claim to be counsel for the comptroller general in the case of Hand *vs.* Dunn, comptroller general, now in the Supreme Court under some supposed contract with my predecessor in office.

I am not aware of any such contract, or of any authority in this office to make such contract, and, therefore, cannot recognize it.

The connection of the comptroller general with the case is official, and the attorney general has been requested to represent this office in the cause.

Very respectfully,

JOHNSON HAGOOD,
Comptroller General South Carolina.

146 No. 40.

Letter of William Stone, of Corbin & Stone, to Comptroller General Hagood.

GREENVILLE, S. C., *August* 20, 1877.

Hon Johnson Hagood, comptroller general, Columbia, S. C.

DEAR SIR: Yours of the 11th inst., relative to the case of Hand *vs.* Dunn, Comptroller-General, is received.

We are the attorneys of record in the State courts in that case, and Mr. Corbin is the attorney of record in the Supreme Court of the United States. We consider ourselves bound, by our contract of employment with your predecessor, to conduct the case to its end in the Supreme Court of the United States, and are ready and willing to do it. As Mr. Corbin is at present absent in Europe, I am not able to consult him in the matter; but I am confident that he will decline to allow the substitution of another attorney in his place in the United States Supreme Court, except upon condition that the payment of our account for professional services in this case, provided for by your predecessor, is confirmed by you.

Very respectfully, your obedient servant,

WILLIAM STONE,
For CORBIN & STONE.

No. 41.

Letter of Attorney General LeRoy F. Youmans to D. T. Corbin, of Corbin & Stone.

EXECUTIVE DEPARTMENT,
OFFICE OF ATTORNEY GENERAL,
COLUMBIA, S. C., *January* 15, 1878.

D. T. Corbin, Esq.

DEAR SIR: I have received through the mail a printed slip under the caption "Reply of Hon. D. T. Corbin, Senator-elect of South Carolina, to Charges of Washington Post," on the margin of which you write, in manuscript, to the attorney general of South Carolina: "As to matter stated of Savannah and Charleston rail-
147 road case, and underscored, please take notice, I shall be ready to make the final argument in the case when it is reached. In my settlement with Comptroller General Dunn for services rendered in this case, we made it a condition that I should make the final argument in the cause."

Not admitting or acquiescing in the correctness of any portion of the printed or manuscript matter aforesaid, it is, perhaps, proper that I should state to you, as I hereby do, that in the cause No. 201 in the Supreme Court of the United States, entitled Daniel Hand, plaintiff in error, *vs.* Thomas C. Dunn, comptroller general of the State of South Carolina, to which you refer, the name of Johnson Hagood has been substituted of record for that of Thomas C. Dunn, and that I am instructed, as attorney general, to represent said

Hagood, comptroller general of the State of South Carolina, and will do so; and that you have no authority from the Governor, the comptroller general, the attorney general, the Legislature, or any one else, to represent said Hagood; and that Dunn had no authority to make the arrangement stated.

Very respectfully,

LEROY F. YOUMANS,
Attorney General South Carolina.

Sent you by mail, in duplicate, one copy, whence your letter was directed, care of William Stone, attorney-at-law, 243 Broadway, New York; one copy, Washington, D. C.

No. 42.

Letter of D. T. Corbin, late of Corbin & Stone, to Attorney General LeRoy F. Youmans.

No. 1336 CORCORAN STREET,
WASHINGTON, D. C., *January* 20, 1878.

LeRoy F. Youmans, attorney general South Carolina.

DEAR SIR: Your letter of the 15th inst. is received, as also the duplicate sent me to New York. The same has been duly considered.

148 If you, as attorney general of South Carolina, and the comptroller general of South Carolina, wish Corbin & Stone to retire from the suit referred to by you, No. 201 on the Supreme Court docket, it is very easy for you and for him to say so, and say so directly. Mr. Stone and myself, late partners, are the attorneys of record, and have been from the commencement of the cause, and evidence of our authority, both from the comptroller general of South Carolina and the attorney general of South Carolina, to conduct said cause, appears in the record.

Now, if you and the present comptroller general, having been informed of our arrangement with Mr. Dunn, late comptroller general of South Carolina, to "conduct the suit to conclusion in the Supreme Court of the United States, without further charge in that behalf," do not wish any further services from Corbin & Stone in said cause, then please join in a letter to said Corbin & Stone, or to me, saying so. We cannot be kicked out of the cause by a simple declaration from you that we have no "authority" to be in it. You may be mistaken!

A formal discharge from the suit, by the officers of the State authorized to give it, is required; that is all. Failing to receive such discharge, I, as representing the rights of Corbin & Stone, shall be present in court when the case is called, and shall ask the court to determine whether you or I have authority to represent the interests of the comptroller general and State in said cause, and shall

ask for an order, in accordance with said determination, which will strike one of us from the record.

Very respectfully,

D. T. CORBIN,
Of late firm of Corbin & Stone.

149 APPENDIX.

Information.

STATE OF SOUTH CAROLINA, *Beaufort County:*

Court Common Pleas.

STATE OF SOUTH CAROLINA, Plaintiff,
against
THE SOUTH CAROLINA PHOSPHATE COMPANY, Limited, a Corporation in and of Great Britain, but doing business in the State of South Carolina, in Beaufort County, and there commonly known as The Oak Point Mines, and of which Joseph Campbell is Agent, and in his absence Daniel Roberts is Agent, Defendant.

Informing on behalf of the State of South Carolina, Samuel W. Melton, attorney general, gives said court to understand and be informed:

First. That said defendant, of Beaufort county and State of South Carolina, on the first day of October, in the year of our Lord one thousand eight hundred and seventy-three, at North Wimbee creek, a navigable stream in the county of Beaufort, in the State of South Carolina, useful for the purposes of trade and commerce, and in which the tide from the sea ebbs and flows, did intrude upon the rights and property of the State of South Carolina, by digging, mining, and removing from the bed of said stream, below usual high-water mark, at the place aforesaid, fifteen thousand tons of the phosphate rock and phosphatic deposits, of the value of ninety thousand dollars, and did convert the same to its own use, contrary to law.

Second. That said defendant, on the first day of October, in
150 the year of our Lord one thousand eight hundred and seventy-three, in the bed of said North Wimbee creek, in the county of Beaufort aforesaid, below usual high-water mark, did engage in the business of digging, mining, and removing phosphate rock and phosphatic deposits, and is intending to be engaged in the said business of digging, mining, and removing from the bed of said stream, within the jurisdiction of the State of South Carolina, the phosphate rock and phosphatic deposits, and with intent to convert the same to its own use, without permission of the State of South Carolina and contrary to law, and unless restrained by this honorable court will mine and remove all, or the accessible and valuable portion, of said phosphate deposit and do irreparable injury thereto.

Third. That the State of South Carolina has duly asserted her interest and property in the said phosphate rock and phosphatic

deposits in said river and in the beds of the navigable streams and waters within the jurisdiction of the State of South Carolina by an act entitled "An act to grant to certain persons therein named and their associates the right to dig and mine in the beds of the navigable streams and waters of the State of South Carolina for phosphate rock and phosphatic deposits," passed March 1st, 1870, and that said persons named in said act have accepted said grant and complied with the terms and conditions thereof.

Fourth. Wherefore plaintiff demands judgment for ninety thousand dollars, and that the defendant be perpetually enjoined from digging, mining, and removing from the bed of the said North North Wimbee creek, below usual high-water mark, the phosphate rock and phosphatic deposits and from carrying on the business of digging, mining, and removing from the bed of said stream or other navigable streams within the jurisdiction of the State of South Carolina, below usual high-water mark, the phosphate rock and phosphatic deposits.

SAMUEL W. MELTON,
Attorney General.
CORBIN & STONE,
Of Counsel.

(NOTE.—Summons dated October 29, 1873.)

151 THE STATE OF SOUTH CAROLINA, *Beaufort County:*

THE STATE OF SOUTH CAROLINA
against
SOUTH CAROLINA PHOSPHATE COMPANY, Limited, a Corporation in and of Great Britain, but doing business in the State of South Carolina, Beaufort County, and there commonly known as The Oak Point Mines, and of which Joseph Campbell is Agent, and in his absence Daniel Roberts is Agent.

The defendants, answering the complaint herein, say:

1. That North Wimbee creek, in the county of Beaufort aforesaid, is not a navigable stream; that the defendants have not intruded upon the rights of the State of South Carolina, and they have not dug, mined, and removed, below the usual high-water mark, from the bed of said stream, at the place aforesaid, the number of tons of phosphate rock and phosphatic deposits in the first paragraph of the information mentioned.

2. That the defendants admit that they did engage in the business of digging, mining, and removing phosphate rock and phosphatic deposits, and intend to be engaged in the said business of digging, mining, and removing, from the bed of said stream the phosphate rock and phosphatic deposits, but they deny that the same is the property of the State of South Carolina.

3. The defendants deny that the State of South Carolina has asserted her rights in the manner set forth in the third paragraph of the information in the said North Wimbee creek, the same not being a navigable stream.

SIMONS & SIMONS,
Defendant's Attorneys.

152 *Order of Reference.*

STATE OF SOUTH CAROLINA, *Beaufort County:*

Court Common Pleas.

STATE OF SOUTH CAROLINA

vs.

THE SOUTH CAROLINA PHOSPHATE COMPANY, *alias* THE OAK POINT MINES.

On motion of the attorneys and counsel for plaintiff and defendants in this information, it is—

Ordered and adjudged, That the cause be referred to Asher D. Cohen, Esq., of Charleston, in the State aforesaid, to report generally thereon, with any special matter.

February 5, 1874.

(Signed) JOHN J. MAHER,
Circuit Judge.

Order.

STATE OF SOUTH CAROLINA, *Beaufort County:*

Court Common Pleas.

SAME *vs.* SAME.

The report of Asher D. Cohen, special referee, being filed and read, it is—

Ordered and adjudged, That the findings of fact therein set forth be confirmed and stand as the judgment of the court as to the facts so found.

It is further ordered, That it be referred back to Asher D. Cohen, Esq., a special referee, to take the testimony and report the facts as to the remaining questions of fact in the case and the testimony in connection therewith.

The defendants having executed their bond in the penal sum of fifty thousand dollars, conditioned to to pay royalty and to make returns according to law, if, in the ultimate determination of this cause, they shall be bound to do so:

153 Be it further ordered, That the said bond be filed in the office of the clerk of this court, and be retained and safely kept by the clerk, subject to the order and direction of this court.

It is further ordered and adjudged, That the defendants may continue to proceed with their mining operations in the said North Wimbee creek, on the south half and side thereof, from the centre of said stream opposite to and adjoining said defendants' lands, according to the articles of association between them and the Marine and River Mining and Manufacturing Company; and as to the remainder of the said creek, to wit, the north half and side thereof, from the centre of said stream, the said company, its officers, ser-

vants and agents, are enjoined and restrained from digging, mining, and removing the phosphate rock and phosphatic deposits therefrom.

JOHN J. MAHER.

June 8, 1874.

Decree.

STATE OF SOUTH CAROLINA, *Beaufort County:*

Court Common Pleas.

SAME *vs.* SAME.

Pursuant to the opinion of the court filed in this cause, it is—

Ordered, adjudged, and decreed, That the defendant do pay to the plaintiff in the above-entled cause, the sum of five thousand nine hundred and eighty-four dollars, principal sum, the same being royalty due the plaintiff upon the five thousand nine hundred and eighty-four tons of phosphate rock, as per report, dug, mined, and removed from the bed of North (and South) Wimbee creeks, to wit, within the line drawn through the very centre of North (and South) Wimbee creeks, down to low water-mark at the confluence and the line of usual low water-mark around the land of the defendant.

154 It is further ordered that the injunction heretofore granted on the 8th day of June, A. D. 1874, in the above-entitled cause, to wit, that the defendant company, its officers, servants, and agents, are enjoined and restrained from digging, mining, and removing the phosphate rock and phosphatic deposits from the bed of the north half and side of North Wimbee creek, be made perpetual.

It is further ordered that the defendant company, its officers, servants, and agents, be enjoined and restrained from digging, mining, and removing the phosphate rock and phosphatic deposits from that part of the bed of North Wimbee creek, lying below usual low-water mark, opposite to and adjoining the lands of the defendant and the centre of said stream, until said defendant shall file, or cause to be filed, in the office of the comptroller general of the State of South Carolina, a bond in the penal sum of $50,000, conditioned and approved and renewable, according to the provisions of section 3 of the act entitled "An act to grant to certain persons therein named, and their associates, the right to dig and mine in the beds of the navigable streams and waters of the State of South Carolina for phosphate rock and phosphatic deposits," passed March 1, A. D. 1870.

It is further ordered that the parties to this cause have leave to apply to this court hereafter for any further order necessary to carry the opinion and decree herein into effect.

It is further ordered that the clerk do tax the costs of the plaintiff, and for said costs and for said principal sum of five thousand

nine hundred and eighty-four dollars the plaintiff do have execution.

July 12, 1875.

(Signed) JOHN J. MAHER.

Filed July 21, 1875.

155 *Order.*

STATE OF SOUTH CAROLINA, *Beaufort County:*

Court Common Pleas.

SAME *vs.* SAME.

The defendant in the above-entitled cause having executed its bond in the penal sum of fifty thousand dollars, conditioned to pay royalty and to make returns according to law, if, in the ultimate determination of said cause, they shall be bound to do so, and said bond having been filed in this court, it is, on motion of Corbin & Stone, attorneys for the State—

Ordered, That it be referred to Asher D. Cohen, Esq., of Charleston, to hear and determine how many tons of phosphate rock have been dug, mined, and removed from the bed of North Wimbee creek, below usual low-water mark, by the defendant company, in addition to the five thousand nine hundred and eighty-four tons of phosphate rock reported cleared to October the first, one thousand eight hundred and seventy-three; also, to determine and report the amount of royalty in money due by the defendant to the plaintiff on account of said phosphate rock so dug, mined, and removed.

July 12, 1875.

(Signed) JOHN J. MAHER.

Filed July 21, 1875.

Report.

STATE OF SOUTH CAROLINA, *Beaufort County:*

Court Common Pleas.

SAME *vs.* SAME.

To the Hon. John J. Maher, judge of said court:

By order of July 12, 1875, made in the above-entitled cause, it was referred to me "to hear and determine how many tons
156 of phosphate rock had been dug, mined, and removed from the bed of North Wimbee creek, below usual low-water mark, by the defendant company, in addition to the five thousand nine hundred and eighty-four tons of phosphate rock reported cleared to October the first, A. D. 1873; also, to determine and report the amount of royalty in money due by the defendant to the plaintiff on account of said phosphate rock so dug, mined, and removed."

In pursuance of said order I respectfully report that I have been attended on said reference by the attorneys and counsel of both

parties to this action, and thereupon proceeded with the matter so referred I have some testimony on the part of the plaintiff, and have taken some testimony on the part of the defendant. There is great and manifest difficulty in ascertaining with exactness the actual usual low-water mark, and, therefore, the rock dug on either side of it; but it is conceded on both sides that (22,016) twenty-two thousand and sixteen tons is the amount which the defendants have dug, mined, and shipped and have on hand from the first of October, A. D. 1873, to October 1st, 1875. taken below usual low-water mark, regarding this line in any position which may be assumed or established for its location. This 22,016 tons is in addition to the 5,984 tons heretofere reported cleared to October 1st, A. D. 1873. I therefore determine and report accordingly.

I also determine and report that the amount of money due by the defendant to the plaintiff on account of said phosphate rock so dug, mined, and removed is twenty-two thousand and sixteen dollars.

All of which is respectfully submitted.

November 9, 1875.

ASHER D. COHEN, *Referee.*

157 *Decree.*

STATE OF SOUTH CAROLINA, *Beaufort County:*

Court Common Pleas.

SAME *vs.* SAME.

The report of Asher D. Cohen, Esq., referee in this cause, made and dated the 9th day of November, A. D. 1875, being read, it is ordered and adjuded that the same be confirmed and stand for the judgment and decree of the court.

It is further adjudged and ordered that the defendant pay to Messrs. Corbin & Stone, counsel for the plaintiff in this cause, the sum of twenty-two thousand and sixteen dollars, being the amount stated in the report to be owing by the defendant from the first of October, A. D. 1873, to the first of October, A. D. 1875; and that upon the payment to them of the same, and the further sum of five thousand nine hundred and eighty-four dollars, the amount heretofore adjudged to be owing by the defendants (which last payment the defendants are hereby authorized to make to Messrs. Corbin & Stone), the defendants be discharged and released from all further account and liability for claims in this cause to the first of October, A. D. 1875.

It is further ordered that the said referee report to the court upon what proportion of the phosphate rock which has been dug and mined since the first of October, A. D. 1875, and that shall be hereafter dug and mined in the said North Wimbee creek the defendants shall pay royalty to the State.

November 11, 1875.

(Signed) JOHN J. MAHER.

158 STATE OF SOUTH CAROLINA, *Beaufort County:*

Court Common Pleas.

STATE

vs.

THE SOUTH CAROLINA PHOSPHATE COMPANY, Limited, *alias* THE OAK POINT MINES.

On motion of Corbin & Stone, upon suggestion of Hon. Samuel W. Melton, attorney general, it is—

Ordered, That it be referred to Asher D. Cohen, Esq., to determine and report what per cent. of the fund collected in the above-entitled cause would be proper compensation to be paid to Messrs. Corbin & Stone for their professional services therein.

October 16th, 1875.

(Signed) J. J. MAHER,
Circuit Judge.

Report of Asher D Cohen, Referee.

STATE OF SOUTH CAROLINA, *Beaufort County:*

In the Common Pleas.

THE STATE OF SOUTH CAROLINA, Plaintiff,

vs.

THE SOUTH CAROLINA PHOSPHATE COMPANY.

To the Honorable John J. Maher, judge of the said court:

I respectfully report that by an order bearing date October the sixteenth, eighteen hundred and seventy-five, it was referred to me "to determine and report what per cent. of the fund collected in the above-entitled cause would be proper compensation to be paid to Messrs. Corbin & Stone for their professional services therein." In pursuance of such order, at my request, Messrs. A. G. Magrath, Charles H. Simonton, Henry Buist, and Thomas Y. Simons attended
159 the reference and gave me the benefit of their judgment in reaching a conclusion. These gentlemen have expressed their opinions in the form of statements sworn to and subscribed before me, and are filed as testimony with the report. My position throughout the case as referree has made me entirely familiar with the important questions of fact as well as the great and subtle principles of law raised by the pleadings and lately passed upon by the court. The court is so thoroughly possessed of all matters necessary to a proper understanding and appreciation of the magnitude of the cause that it would be a work of supererogation on my part to compare it with the generality of cases raised and decided in our courts. In the case the plaintiff's attorneys were under the necessity of finding witnesses acquainted with the peculiar facts essential to laying the foundation for the application of those legal grounds upon which the State placed its right to enjoin the defendant from an invasion of its soil without payment of the prescribed royalty. These wit-

nesses, when found, were apart from each other and distant from the city. The great number examined by the plaintiff, as well as by the defendant, extended the cause over a long period of time, claiming and receiving the most careful attention of counsel, these references beginning in June and ending in November, 1874. The testimony as reported covers over a hundred pages of printed matter. It will be readily understood that much time, care, and high ability was required to collate the authorities and reconcile them and apply them to the case in hand. The question involved had never been passed upon in this State; hence the duty devolved on the plaintiff's attorney demanded an extraordinary amount of care, skill, and labor, as well as in the preparation of the argument for this court as for the appeal court, for which latter tribunal the brief was all ready when the defendant abandoned the appeal.

I would respectfully call the attention of the court to the grounds set forth by the witnesses upon which their measure of compensation was based. They cover the entire matter and are clearly and forcibly stated. I would bring to the notice of the court that
160 it was only in case of success that the plaintiff's counsel could expect compensation; their remuneration was practically contingent. In the recommendation hereinafter made, I have looked beyond the mere money decree that will be entered up against the defendant. This is one of the results of success, but, in my opinion, the smallest. The other and greater benefits are in the creation of a continuous annual income to the State, and in the establishment of a precedent by which future litigation in similar causes will be prevented.

Two of the witnesses, Messrs. Simons and Buist, are of opinion that seventy-five per cent. of the amount received would be a fair and reasonable compensation. The other two, Messrs. Magrath and Simonton, deem the plaintiff's counsel should be allowed fifty per cent. of the amount to be paid to the State under the decree, exclusive of the expenditures which they have been called upon to make in the conduct of the case.

After a careful consideration I find and recommend that sixty-two and a half per cent. of the fund collected in this case would be a proper compensation to be paid to Messrs. Corbin & Stone for their professional services therein—this to be exclusive of the disbursements as set out in their statement submitted to me, amounting to three hundred and twenty-five and $\frac{5}{100}$ dollars.

(Signed) ASHER D. COHEN, *Referee.*

Charleston, S. C., October 28th, 1875.

Reference. October 27th, 1875.

THE STATE

vs.

SOUTH CAROLINA PHOSPHATE COMPANY, Limited, *alias* OAK POINT MINES.

Mr. THOMAS Y. SIMONS testifies as viz:

I am familiar with the case, having examined and read the

161 brief containing all of the proceedings from the inception to the end. From my knowledge of the case, of the labor and skill expended, and the professional services rendered under the circumstances, and of the results to the State, I am of opinion that seventy-five per cent. of the amount recovered would be a fair compensation, and such as the services actually rendered were worth.

THOS. Y. SIMONS.

Subscribed and sworn to October 27, 1875.

ASHER D. COHEN, *Referee.*

HENRY BUIST, Esq.:

I concur in the above testimony of Col. Thomas Y. Simons, and would state, in addition, that having been of counsel connected with causes in which questions analogous to those arising in this case were involved, I watched its progress from time to time, and am somewhat familiar with its history. In my judgment the result is largely attributable to the energy and learning displayed by the attorneys representing the State in the cause. The compensation of seventy-five per cent. on the amount recovered is not only just, but reasonable.

HENRY BUIST.

Subscribed and sworn to before me October 27th, 1875.

ASHER D. COHEN, *Referee.*

CHARLES H. SIMONTON, Esq.:

I have examined the brief in this case and read the statement of services rendered by Messrs. Corbin & Stone, and have carefully considered the matter. Inasmuch as the services were rendered, and were to be paid for on the contingency of success, I think that the fee now should be regulated by a percentage on the amount recovered. If the money decree represented all of the advantages resulting to the State from the litigation, I would think 33⅓ per cent. the proper percentage; but inasmuch as the advantage arising
162 to the State from the litigation in receiving a royalty from all the future operations of the defendant greatly exceed the mere amounts of money in the decree, I am of the opinion that there should be allowed 50 per cent. of this amount, in which should not be included the disbursements to which Messrs. Corbin & Stone have been called upon to make in the conduct of the case.

CHARLES H. SIMONTON.

Sworn to and subscribed before me October 27, 1875.

ASHER D. COHEN, *Referee.*

A. G. MAGRATH, Esq.:

I happen to have some knowledge of the scope of the legal questions involved in this case, although not from any connection with the case itself, and can easily have an idea of the difficulties involved in the ascertainment of the facts to which these questions of law must be applicable. I have no doubt the difficulty of getting at the

facts was very great indeed, and the labor involved in the preparation for argument necessarily very great; and although I do not know the facts in the case, I infer that without success the compensation to the counsel who represented the State would have been very inadequate, if, indeed, they got anything at all. In estimating, therefore, what they should receive, I take into consideration three elements: First, the labor and trouble of collecting the testimony, which is not ordinarily part of the business of counsel; next, the labor of counsel in the preparation of the argument; and the uncertainty of adequate compensation unless they were successful. Taking these into consideration, I will give it as my opinion that, exclusive of expenditures, counsel would be entitled certainly to not less than fifty per cent. of the amount to be paid to the State under this decree; and a higher percentage would be, in my opinion, not more than they would be entitled to, because the establishment of the right which has been the result of their labor may possibly, will be,
163 for some amount a continual annual edition to the revenue of the State. And if it it were attempted to approximate in any moderate way to what would be, after the lapse of several years, the whole amount recovered by the State through the efforts of counsel here, the percentage I have named on the particular amount here recovered would be a very small percentage upon the amount of which the State would receive the benefit.

A. G. MAGRATH.

Sworn to before me October 27, 1875.

ASHER D. COHEN, *Referee.*

Claim for Services Rendered by Corbin & Stone on the Part of the State.

STATE OF SOUTH CAROLINA, *Beaufort County:*

STATE *vs.* THE SOUTH CAROLINA PHOSPHATE COMPANY.

Mr. Corbin, of the firm of Corbin & Stone, says:

Our firm was retained in the summer of 1873 by Hon. Samuel W. Melton, attorney general, to commence and conduct, on the part of the State, the above-entitled cause. No retaining fee was paid us or agreed upon, and no arrangement fixing our compensation for the service to be rendered was made; both were left, by necessary implication, to abide the result of the suit.

The cause of action, as then presented to us, was as follows:

There was a large and valuable deposit or mine of phosphate rock in the bed of North Wimbee creek, in Beaufort county. This creek was believed by the attorney general to be a public navigable stream, and, therefore, it was claimed on the part of the State that the phosphate rock therein was the property of the State. But the
164 defendant, The South Carolina Phosphate Company, and their predecessors, claimed, on the other hand, that said North Wimbee creek was a private, non-navigable stream, and that said phosphate deposit was hence their property as riparian proprietors. In pursuance of this claim said phosphate company had entered upon said

phosphate deposit, and for some time had been mining and removing the same, and converting the proceeds thereof to their own use.

After consideration, we determined that the proper remedy for the State was by information, in the name of the attorney general, against said company, to be filed in the court of common pleas for Beaufort county. We accordingly prepared an information, charging the said company with intruding upon the property of the State, &c., and praying judgment for damages on account of phosphate rock dug, and for an injunction to prevent further trespass upon the mine. This information was sent to the honorable attorney general, and by him duly signed and returned to us.

We thereupon issued a summons, and had the same served upon said company. At the same time we prepared a notice and motion for a preliminary injunction, and had same served on the defendant. In support of said motion a large number of affidavits were taken and served on the defendant, and we prepared an elaborate written brief of points and authorities to be submitted on the hearing.

When the time for arguing the motion arrived the defendant company, by its counsel, proposed to give bond in the sum of fifty thousand dollars, conditioned to pay the State for all damages done and to be done to said phosphate mine, if, in the ultimate determination of the cause, it should be decided that said mine was the property of the State. This offer was considered by us satisfactory, and was accepted accordingly, and a bond was accordingly executed by the defendant and, by order of court, filed in the cause.

The defendant answered the information, denying its intru-
165 sion upon the property of the State, and denying that North Wimbee creek was a public navigable stream, and claiming the right to mine the phosphate rock in said creek as the owner thereof, being the riparian proprietor.

The issues in the cause being thus made up, the same were referred to Asher D. Cohen, Esq., to report thereon, and to report in connection therewith any special matter.

Several references were accordingly held before said referee and considerable testimony taken, upon which said referee made a report, stating the amount of phosphate rock mined in said creek, both above and below usual low-water mark. He also reported, as special matter, that said defendant company had, by agreement with the grantees of the State, under the provisions of the act of March 1, 1870, permission to mine in said creek upon the conditions and terms named in said act, viz., making return of the phosphate rock mined, and paying one dollar per ton royalty thereon to the State; but said referee further reported that said company claimed to own said phosphate mine, on the ground that said North Wimbee creek was a private stream, and one-half thereof, where they had mined, was their property by virtue of being the riparian proprietor. The referee reported to the court, by consent of counsel, the following question, to be determined by the court and jury: Is North Wimbee creek a navigable stream?

This report was filed in June, 1874, and confirmed as to the findings of fact; but it was again referred to Mr. Cohen to take testi-

mony, and report the facts as to the remaining questions in the cause.

At the same time an order of injunction was taken in the cause against the defendant company, restraining it from mining in said creek, except within the area covered by the agreement made by it with the grantees of the State, before referred to.

Upon the second reference to Mr. Cohen it devolved upon us to take much testimony in regard to the navigability of North Wimbee creek and its past and present use. Proper witnesses of these
166 facts had to be sought for by us in Beaufort county, eighty miles distant, and brought before the referee in Charleston. It was obtained by us by a personal visit to the spot, and by an agent selected and sent there, without any aid from the State or its officers, and covers sixty-one printed pages of the master's report. The defendant, in reply, examined witnesses, whose testimony covers seventy-three printed pages of the referee's report. These references were commenced June 9, 1874, and continued through the summer, from time to time, until November 17th, 1874, when we submitted to the referee our final argument upon the facts, with a written request to find certain facts and report same to the court.

On the sixteenth day of January, 1875, the referee made and published his report. The report was elaborate and able; but we considered it our duty to except to the same, which we did, filing seven exceptions to the findings of fact and law stated therein.

The cause finally came on for trial at the February term, 1875, of the court of common pleas for Beaufort county, upon the report of the referee, exceptions thereto, and the testimony. The questions of law and fact involved were fully argued by us for the State, and a written brief of seventy-five closely written pages was presented to the court.

Upon the conclusion of the argument the court retained the cause for examination, and subsequently made a decision, filing an elaborate written opinion. The opinion was favorable to the State, sustaining all the more important positions in law and fact claimed by us for the State. Subsequent to the filing of said opinion we prepared and took a final decree in accordance with the principles laid down therein.

The result of the litigation is that North Wimbee creek is held to be a public navigable stream, and the phosphate bed or mine therein, below usual low-water mark, is declared to be the property of the State; and the defendant is decreed to pay a royalty of one dollar per ton for every ton of phosphate rock dug and mined in the
167 bed thereof, below usual low-water mark, and is enjoined and restrained from further mining in the bed of said stream until a bond is given to the State in the penal sum of fifty thousand dollars, conditioned to make returns and pay royalty annually hereafter.

We beg to suggest that the labor put upon us in the conduct of this cause has been unusual and arduous. Contrary to ordinary practice we have been compelled to search, many miles from home, for the witnesses necessary to establish the facts vital to the rights of

the State, and upon which the cause must rest. We have also had to examine and argue many important legal questions, new to the judiciary of the State, and for the first time to be judicially determined. In short, the case, from first to last, as all the counsel engaged in the cause can testify, has demanded and received from us an unusual amount of care and labor.

In addition to labor bestowed we have paid cash in the cause as follows:

1874.

July 29.	For witness' fees	$80 00
Dec. 10.	For printing testimony	108 00
Dec. 22.	For Shaffer and Grimke, stenographers, for taking testimony	61 50
	Personal expenses of three trips to Beaufort	75 00
		$324 50

We respectfully submit to the referee that, in addition to cash expended by us in the cause ($324.50), from sixty to seventy-five per cent. of the fund received in the cause would be proper compensation to us for the said services rendered therein.

CORBIN & STONE,
By D. T. CORBIN.

168 STATE OF SOUTH CAROLINA, *Beaufort County:*

Common Pleas.

STATE

vs.

THE SOUTH CAROLINA PHOSPHATE COMPANY, *alias* THE OAK POINT MINES.

Ex Parte CORBIN & STONE.

Upon reading and filing the report of Asher D. Cohen in the matter of proper compensation to be paid Corbin Stone for services rendered on behalf of the State in the above-entitled cause, it is—

Ordered, That said report be confirmed and stand as the judgment of the court.

4th November, 1875.

(Signed) JOHN J. MAHER.

Petition of the Comptroller General of the State of South Carolina, Filed in the Cause of Daniel Hand against The Savannah and Charleston Railroad Company, for Possession of said Railroad and Appurtenances.

STATE OF SOUTH CAROLINA, *Charleston County:*

Court Common Pleas.

To Hon. J. P. Reed, judge of first circuit:

The petition of Soloman L. Hoge, comptroller general of South Carolina, respectfully shows:

That in the Senate [and] House of the State of South Carolina an act entitled "An act to enable the Savannah and Charleston Railroad Company to complete their road" was duly ratified on the second day of March, A. D. 1869. This act subsequently became a law and of force, as appears from the records of the office of the secretary of State and the records of the office of your petitioner.

169 That on the 18th day of February, A. D. 1875, it was officially brought to the attention of your petitioner that the said Savannah and Charleston Railroad Company had failed to pay the interest upon its debt within six months after it became due; that the said company did not on the first day of March, A. D. 1874, pay the interest coupons upon their bonds which fell due on that day, the payment of which bonds and coupons had been previously guaranteed by the State, and said company has continued to fail, up to the present time, to pay the said interest upon said debt, though by the holders thereof demanded.

That therefore your petitioner, pursuant to the provisions of section five of said act, attempted to take possession of said Savannah and Charleston railroad, with its appurtenances, and on the 24th day of February, A. D. 1875, at the city of Charleston, made due and formal demand upon Charles T. Mitchell, Esq., president of the said Savannah and Charleston railroad, to turn over to your petitioner forthwith said Savannah and Charleston railroad, with all its appurtenances; that a copy of said demand, in writing, is herewith attached as Exhibit A.

That said Charles T. Mitchell, in response to said demand, did refuse to turn over to your petitioner said Savannah and Charleston railroad, with its appurtenances. A copy of said Mitchell's refusal is herewith appended as Exhibit B.

That in stating his reasons for said refusal said Charles T. Mitchell claims to be in possession of said Savannah and Charleston railroad as receiver, appointed under the pretended order or decree of Hon. R. F. Graham, late judge of the court, made in the case of Daniel Hand against The Savannah and Charleston Railroad Company and others, filed April 28, 1874.

Your petitioner respectfully shows unto your honor that, as comptroller general of the State, it is made his duty, and he is given the power by the aforesaid act, to take immediate possession of the said Savannah and Charleston railroad, with all its appurtenances, upon the happening of the contingency above recited; and as in duty

bound your petitioner is ready and desirous of executing the
170 power aforesaid vested in your petitioner; but your petitioner, out of respect to what appears to have been an administrative order or decree, made by the late judge of this court, brings to the attention of your honor the facts above set forth, and the power and duty aforesaid, imposed by the act aforesaid upon your petitioner, and prays that your honor will rescind so much of said order or decree of April 28, 1874, as placed said Savannah and Charleston railroad in the possession of said Charles T. Mitchell as receiver, and thus enable your petitioner to take possession thereof; and should your honor, for any purpose connected with the said case of Daniel Hand against The Savannah and Charleston Railroad and others deem it advisible that said receivership be continued, your petioner respectfully suggests that, with the other duties imposed upon your petitioner by law, your petitioner may perform that duty under your honor.

Your petitioner prays that such order, as indicated, may be made, or such other order be made as to your honor shall seem right, that will remove the obstacle now interposed by said Charles T. Mitchell to the performance of the duty imposed by law upon your petitioner, relative to said Savannah and Charleston railroad.

And your petitioner will ever pray, &c.

(Signed) SOLOMON L. HOGE,
Comptroller General South Carolina.
CORBIN & STONE,
Solicitors for Petitioner.

Filed March 1, 1875.

EXHIBIT A.

To Charles T. Mitchell, Esq., Charleston, S. C.

SIR: It has been officially brought to my attention that the Savannah and Charleston Railroad Company has failed to pay the interest upon its debt within six months after it became due; that the interest due upon the debt of said company on the first day of March, A. D. 1874, was not then paid, nor has the same since been paid, though demanded. The debt of said company, upon which
171 it has thus failed to pay the interest, was duly guaranteed by the State under the provisions of section three of the act entitled "An act to enable the Savannah and Charleston Railroad Company to complete their road," ratified on the second day of March, A. D. 1869, and which subsequently became a law, as appears from the records of my office.

It has, therefore, become my duty, as comptroller general of the State, under the provisions of section five of said act, to take immediate possession of the road of said company, with all its appurtenances. I do, therefore, under and pursuant to authority vested in me as comptroller general of the State of South Carolina by the above act, demand that you turn over to me forthwith said Savannah and Charleston railroad, with all of its appurtenances.

Very respectfully,

(Signed) S. L. HOGE,
Comptroller General for the State of South Carolina.

Charleston, S. C., February 24, 1875.

EXHIBIT B.

CHARLESTON, S. C., *24th February*, 1875.

Hon. S. L. Hoge, comptroller general South Carolina.

SIR: To your demand of this date for possession of the Savannah and Charleston Railroad Company and its appurtenances, I respectfully answer that I was put in possession under a decree of the court of common pleas, a copy of which I herewith enclose, and I cannot comply with your demand without a dereliction of duty and contempt of the authority of that court. I am further advised that the authority under which you claim possession has been suspended, on the part of the State, by subsequent legislation. I respectfully refer you to J. B. Campbell, Esq., who is authorized to appear for me to any process and answer.

Very respectfully, your obedient servant,

C. T. MITCHELL,
Receiver S. C. R. R. Co.

172 OFFICE OF ATTORNEY GENERAL
COLUMBIA, S. C., *8th November*, 1875.

Hon. T. C. Dunn, comptroller general.

DEAR SIR: In answer to your communication of this date, I have to say:

1. The fund resulting from the litigation in the case of the State *vs.* The South Carolina Phosphate Company will, when paid, be in the hands of the sheriff of Beaufort county, or the attorneys for the plaintiff.

2. The remainder of the fund will be payable to the proper officer of the State.

Whether it can be so arranged as to allow Messrs. Corbin & Stone to retain any portion of the remainder, as "compensation for the expenditures and services in the Savannah and Charleston Railroad case," will depend upon the concurrence of this officer.

Yours, respectfully,

SAMUEL W. MELTON,
Attorney General.

In the Common Pleas.

STATE OF SOUTH CAROLINA, *Beaufort County*:

THE STATE OF SOUTH CAROLINA, Plaintiff,
against
THE SOUTH CAROLINA PHOSPHATE COMPANY, Limited, *alias* THE OAK POINT MINES, Defendant.

To the Honorable John J. Maher, judge of said court:

I respectfully report that, by an order of this honorable court dated the eleventh day of November, eighteen hundred and seventy-five, it was referred to me to report to the court upon what proportion of

the phosphate rock which shall have been dug and mined since the first of October, eighteen hundred and seventy-five, and shall be hereafter dug, the defendant shall pay royalty to the State.

173 In pursuance thereof I have held several references, at which I have been attended by the solicitors for the State and the solicitors for the defendant. I have taken and had before me the testimony of very many witnesses, both on the part of the State and of the defendant. The State proposed, and it was not objected to, that the testimony heretofore taken by me in this cause and reported to the court should be considered as before me for the purposes of this present reference.

The testimony of a great number of witnesses who had been examined in the case of The William Island Phosphate Company against The Marine River Phosphate Mining and Manufacturing Company, as taken by the stenographer, was offered and received, excepting the testimony of such of those witnesses as were examined before me in this case.

After a careful examination and consideration of the testimony before me, I find as matters of fact as follows:

First. That the channel of the North Wimbee creek, if any, is on the William Island side, and that there was more water at low tide on the William Island side than on the Oak Point Mines side at low tide.

Second. That the shore of said creek, on the Oak Point Mines side thereof, is very irregular, very much indented, and the indentations very irregular.

Third. I find that there are several small islands on the Oak Point Mines side of said creek that are always bare and exposed at low water.

Fourth. I find the influx and the reflux of the tide so much influenced by the varying winds that, in connection with the facts above found, it is practically impossible to locate, with certainty and permanency, a low water-mark, or to designate the same with anything like mathematical precision.

Fifth. I find that on the Oak Point Mines side of said creek there is about as much land bare at low water-mark, between high water-mark and the centre of the stream, as there is land covered by water at low water between the centre of the stream and low water.

174 In obedience to the order of the court above cited I therefore find and recommend that one-half of all the rock dug and removed since the first day of October, eighteen hundred and seventy-five, and that shall hereaftar be dug and removed by the defendant, be adjudged to be the property of the defendant, and that the claim of the State be defined and be limited to the other half thereof, and that the prescribed royalty be only paid by the defendant on said last-mentioned half.

All of which is respectfully submitted.

(Signed) ASHER D. COHEN, *Referee.*

December 6, A. D. 1875.

STATE OF SOUTH CAROLINA, *Beaufort County:*

Court Common Pleas.

THE STATE

vs.

THE SOUTH CAROLINA PHOSPHATE COMPANY, Limited, *alias* THE OAK POINT MINES.

The report of Asher D. Cohen, Esq., referee in this case, made and dated the sixth day of December, A. D. 1875, being read, and Messrs. Corbin & Stone for the plaintiff, and Messrs. Simons & Simons for the defendant, being heard, it is—

Ordered, adjudged, and decreed, That the said report be confirmed and stand as the judgment of the court.

It is further ordered, adjudged, and decreed, That the defendant do pay to the State annually, on the first day of October hereafter, one dollar per ton on one-half of all the tons of phosphate rock by them dug, mined, and removed from the bed of North Wimbee creek, between high-water mark, on the south side of said creek and the centre of the stream, during the year preceding.

It is further ordered, adjudged, and decreed, That the bond
175 required to be filed by the defendant in the office of the comptroller general of the State by the decree filed in this cause, July 21, 1875, be conditioned that said defendant shall make true and faithful returns to said comptroller general annually on or before the first day of October, and oftener if required by the said comptroller general, of one-half of the number of tons of phosphate rock and phosphatic deposits dug, mined, and removed by them from the bed of North Wimbee creek, between high-water mark, on the south side of the said creek and the centre of the stream, and shall punctually pay to the State treasurer annually on the first day of October one dollar per ton for one-half of all the tons of phosphate rock and phosphatic deposits by them dug, mined, and removed from the bed of said North Wimbee creek, as aforesaid, during the year preceding; said bond to be renewed annually, and approved by the attorney general.

On motion of Simons & Simons.

(Signed) JOHN J. MAHER.

17th December, 1875.

176 (*Bond.*)

THE STATE OF SOUTH CAROLINA:

Know all men by these presents that the South Carolina Phosphate Company, Limited, a corporation in and of Great Britain, but doing business in the said State of South Carolina, in Beaufort county, and there commonly known as the Oak Point Mines, and John H. Hamilton, are jointly and severally held and firmly bound unto the said the State of South Carolina in the penal sum of fifty thousand dollars, to be paid to the said State of South Carolina or

assigns; to which payment, well and truly to be made and done, the said corporation and the said John H. Hamilton bind themselves jointly by these presents.

In witness whereof the said corporation have hereunto caused their seal to be affixed, testified by the hand of the said John H. Hamilton, and the said John H. Hamilton has hereunto set his hand and seal on the — day of ——, A. D. 1874.

Whereas an information on behalf of the State of South Carolina, by the Honorable Samuel W. Melton, attorney general, has been instituted against the said corporation by the name and title aforesaid, wherein the said State has claimed that the said company or corporation has mined and removed from the North Wimbee creek, in the said county, phosphate rock and phosphatic deposits, with a view to convert the same to their own use, and the said defendants claim that they have the right and are entitled as riparian owners of the soil to dig, mine, and remove the phosphate rock and phosphatic deposits from the bed of North Wimbee creek down to the centre or file thereof—that is to say, from one half of the said stream; but it has been agreed by and between the parties to the said cause, to wit, the said State of South Carolina and the said defendants, the company or corporation aforesaid, that if the said company
177 or corporation being, as they are, the owners of the soil on the south side of the said North Wimbee creek, were or are in any manner or way whatsoever lawfully entitled to the soil as riparian owners down to the centre of the said North Wimbee creek, and it shall be so ultimately decided by the judgment of the highest court of this country having jurisdiction of the subject, then that the State has no claim or demand against them whatsoever, and the above bond shall be void and of no effect.

But that if, as such riparian owners, the said company shall be held by the determination aforesaid for any legal reason not to have been and not to be entitled to the ownership of the soil down to the centre or file of the said North Wimbee creek, then that the said company or corporation shall pay to the said State a royalty of one dollar per ton for each and every ton of phosphate rock and phosphatic deposits removed and shipped by them as follows, to wit: On the following number of tons removed and shipped to the first October, 1873—that is to say, on four thousand two hundred and thirty-seven tons so taken between high and low water mark, if it shall be determined as aforesaid that they had no right to the soil between high and low water mark; and on five thousand nine hundred and eighty-four tons so taken between low water and the centre of the stream, if it shall be determined as aforesaid that they had no right to the soil down to the center of the said stream. Also to pay one dollar per ton for each and every ton that shall have been so removed and shipped by them after first October, 1873, until such ultimate and final decision of the court aforesaid, upon which it shall be so determined that they are bound to pay a royalty to the said State, according as their riparian right and ownership of the soil shall be so held to be and extend to high-water mark, to low-water mark, or to the centre of the stream,

and shall also make a true and faithful return to the State auditor of the number of tons so removed and shipped between the said first day of October, 1873, and the time when the said ultimate and final determination of the said rights shall have been made as
178 aforesaid, and shall pay the said royalty, if so determined by the court, on such final and ultimate determination.

Now, the condition of this obligation is such that if the above-bound company or corporation shall and do well and truly in all things keep and perform the agreement in the said foregoing recital contained, and in all respects conform thereto, then the above obligation shall be null and void; otherwise it shall remain in full force and virtue.

[SEAL.] THE SOUTH CAROLINA PHOSPHATE COMPANY, LIMITED, OTHERWISE CALLED OAK POINT MINES, PER THEIR ATTORNEY,

(Signed) JOHN H. HAMILTON.

(Signed) JOHN H. HAMILTON. [SEAL.]

Sealed and delivered in the presence of—
(Signed) JAMES SIMONS.

179 THE STATE OF SOUTH CAROLINA, *Beaufort County:*

In the Common Pleas.

THE STATE OF SOUTH CAROLINA

vs.

THE SOUTH CAROLINA PHOSPHATE COMPANY.

The report of Asher D. Cohen, Esq., special referee, being filed and read—

It is ordered and adjudged that the findings of fact therein set forth be confirmed and stand as the judgment of the court as to the facts so found.

It is further ordered that it be referred back to Asher D. Cohen, Esq., as special referee, to take the testimony and report the facts as to the remaining questions of fact in the cause and the testimony in connection therewith.

The defendants, having executed their bond in the penal sum of fifty thousand dollars, conditioned to pay royalty and to make returns according to law, if, in the ultimate determination of this cause, they shall be bound to do so, be it further ordered, that the said bond be filed in the office of the clerk of this court, and be retained and safely kept by the clerk, subject to the order and direction of this court.

It is further ordered and adjudged that the defendants may continue to proceed with their mining operations in the said North Wimbee creek, on the south half and side thereof, from the centre of the said stream, opposite to and adjoining said defendant's lands,

according to the articles of association between them and the Marine River Mining and Manufacturing Company; and as to the
180 remainder of the said creek, to wit, the north half and side thereof, from the centre of said stream, the said company, its officers, servants, and agents, are enjoined and restrained from digging, mining, and removing the phosphate rock and phosphatic deposits therefrom.

JOHN J. MAHER.

We assent to this order, June 8, 1874.

SIMONS & SIMONS,
Defendant's Attorneys.

181 THE STATE OF SOUTH CAROLINA,-*Beaufort County:*

In the Court of Common Pleas.

THE STATE
vs.
THE SOUTH CAROLINA PHOSPHATE COMPANY, Limited, *alias* THE OAK POINT MINES.

This is an information filed by the attorney general, in which it is alleged that the defendants have intruded upon the rights and property of the State in North Wimbee creek, a navigable stream, useful for purposes of trade and commerce, in which the tide from the sea ebbs and flows, by digging, mining, and removing from the bed of said stream, below usual high-water mark, phosphate rock and phosphatic deposits, of a stated quantity and value; and that they are engaged in such business, and intend to pursue it; and judgment is demanded for the value of the rock and deposits so appropriated, and for a perpetual injunction to restrain like operations in future.

Defendants, in their answer to the information, admit the acts charged, and that they are engaged in and intend to continue the business of digging, mining, and removing said rock and deposits, but deny that they have appropriated the quantity alleged; that said creek is a navigable stream; that the rock and deposits therein are the property of the State.

Upon this issue the cause was referred, by a consent order, to Asher D. Cohen, Esq., as special referee, "to report generally, with any special matter."

The report of the special referee was presented at the June term, 1874, wherein certain findings of fact were set forth, and, at the suggestion of counsel, a question was proposed for determination by a jury, under instructions as to the law, viz: Is North Wim-
182 bee creek a navigable stream? In this report reference is made in general terms to a certain grant, as part of and to be submitted with the report, under which defendants set up a claim of title to low-water mark in the bed of said creek. It is proper to state here that said grant bears date 17th June, 1869, and purports to convey to one Henry M. Stuart 343 $\frac{21}{100}$ acres of land, bounded

north and northeast by North Wimbee creek, and south and southeast by South Wimbee creek, "and on each and every of said water courses extending to low-water mark."

The report being read and filed, a consent order was taken 8th June, 1874, confirming said findings of fact, and referring it back to the special referee, "to take the testimony and report the facts as to the remaining questions of fact in the cause and the testimony in connection therewith."

On the coming in of the report of the special referee at February term, 1875, the cause was brought on to be heard upon the pleadings, the findings of fact set forth in the two reports, and certain exceptions on the part of the plaintiff to the second report, and was argued by the counsel of the respective parties.

Further preliminary statement is deemed unnecessary. Referring to the papers in the cause, which will speak intelligibly for themselves, I proceed at once to rule upon the exceptions in their order, and will then state my conclusions as to the law upon the merits.

1. The pleadings raise three issues: (1.) As to the quantity of rock appropriated; (2.) As to the navigability of the creek; and (3.) As to the title of the State in the bed of the creek. The referee reported facts as to the first and third of these issues; and as the order referring the case back limited inquiry to the "remaining questions of fact," it is plain that the second reference was restricted to facts embraced in the general question as to the navigability of the stream. If this question had been submitted to a jury, as was first intended, their verdict would have ripened the case for final determination, and it is manifest from the terms of the order of June 8, 1874, confirming the referee's findings of facts, that they were closed
183 from further investigation. But it appears that the findings now excepted to are based upon testimony which was admitted without objection, and that the referee was not called on to determine the scope of the order until the reference had been closed and requests of counsel were presented. I think, under these circumstances, that the referee rightly conceived his duty in considering such testimony and in reporting his conclusions thereon; and these being before the court, without complaint of any prejudice worked by the introduction of the testimony, should not be discarded in deference to an objection which now assumes a purely technical form. The exception is overruled.

2. If the question as to the length of the bar up and down the creek depended entirely on the estimates of the witnesses who spoke from mere observation, I would not feel warranted in disturbing the referee's findings. But the wide differences that prevailed in these estimates give especial prominence and weight to any testimony on this point which is founded on actual measurement. I think the map made by Edward F. Kittoe should control in determining the length of the bar. He is a civil engineer and surveyor by profession, and also superintendent of defendant's works, and he made this map for the use of the dredge, and to keep account where it worked. True, he did not vouch for its perfect accuracy, yet he testified conformably to it, in stating that the bar averages two hundred

and fifty yards in length. Allowing for some exactness in the measurement, the map still outweighs, in my judgment, estimates based on observations more or less casual, and I am satisfied that the length of the bar does not exceed three hundred yards. The hydrographical map of Barbot and Smith supports this conclusion, and the weight of the general testimony is to the same effect. The exception is sustained, and the court substitutes this finding for that of the referee; that the length of the bar up and down the creek is about three hundred yards.

3. The United States coast survey was very properly adopted
184 by the referee as the most scientific and exact representation of "the depth of water and tides in said stream." The soundings, as expressed in the chart, show the depth of mean low water. A section of the bar is represented as dry at low water, and the depth of mean low water upon the remainder of the bar is given as six inches. The fall of low water below the plane of reference, at spring tides, is seven inches, and the height of low water above the plane of reference at neap tides is six inches. These are facts in the case which have not been discredited. I am unable to reconcile them with the findings of the referee that ordinarily the plateau practically runs dry at low tide. Such undoubtedly is the case at low spring tides, and that it is frequently so at ordinary low tide, when off-land winds prevail, is made clear by the testimony. But I cannot understand how a place upon which the mean depth of low water is six inches can ordinarily be dry. The findings of the referee must be corrected in this particular, and the court substitutes the following: That at extreme low tides, and frequently at low tides, when the same are affected by off-land winds, the plateau practically runs dry, etc.

4. The conclusion of the referee does not seem to me to be compatible with that suggested as the proper conclusion in this exception. Both results are, I think, regularly deducible from the data given in the report. The referee states the rise of the tide upon the plateau to be about six feet, gives the rate of rise and fall, and concludes that for about twelve hours in each twenty-four there is a depth of from two and a half to three feet of water. Plainly this statement does not convey the idea that during the time specified there is no greater depth of water on the plateau than two and a half or three feet. I do not perceive any error in this conclusion, and accordingly overrule the exception.

5. There is no proper or sufficient proof of the existence of old rice fields, now submerged with salt water, on the promontory towards Horse Landing. The testimony on this point is mere hear-
say, and this of the most vague and indefinite character. Old
185 residents on the creek who were examined make no mention of this circumstance, which could not possibly have escaped their observation if it really existed. The general testimony makes decidedly against the probability of rice cultivation on Kean's Neck at any period of the past, and it is certain that for the last forty years rice has not been planted on the creek, except at its extreme headwaters, eight miles at least from the bar, and on the east of the

stream where the waters of the Combahee are accessible for purposes of irrigation. The finding of the referee is reversed, so far as it certifies the existence of old rice fields on the promontory.

6. For reasons stated in the ruling upon the first exception, the finding impugned by the sixth exception must stand; but the clear weight of the testimony entitles the plaintiff to a finding of further matter, as suggested in the exception, and the court makes such finding, as follows: That the lands on either side of North Wimbee creek, where the phosphate beds in controversy are deposited, are not now, nor have they ever been, rice lands.

7. The seventh exception is overruled.

The questions to be considered are—

1. Whether North Wimbee creek is a navigable stream; and, if such, then—

2. Whether defendants have established title against the State to the bed of the creek below usual high-water mark; and, if so, to what extent: to low-water mark only or to the centre of the stream?

I. Our own cases afford little light on the subject of navigability beyond the observation of Judge Nott, Cates *vs.* Wadlington (1 McCord, 580), that "that cannot be considered a navigable river the natural obstructions of which prevent the passage of boats of any description whatever." In the case of the Daniel Ball (10 Wallace, 557), the Supreme Court of the United States held that rivers are navigable in fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on
186 water." This definition was followed and further elucidated in the case of the Monticello (19 Wallace), where it was held that "the capability of use by the public, for the purposes of transportation and commerce, affords the true criterion of the navigability of a river rather than extent and manner of that use. If it be capable, in its natural state, of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." The Court considered the vital and essential point to be, "whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigability may be encompassed with difficulties by reason of natural barriers, such as rapids and sand bars." Numerous authorities are cited in support of these propositions. The following remarks of Chief Justice Shaw, in Row *vs.* Granite Bridge Co. (21 Pick, 344), are quoted with approbation: "It is not every small creek in which a fishing-skiff or gunning-canoe can be made to float at high water which is deemed navigable; but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture." The well-considered case of Morgan *vs.* King (35 New York, 454) is among the cases cited. The true rule on this subject was there declared to be "that the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of

water, of transporting, in a condition fit for market, the products of the forests or rivers or of the tillage of the soil upon its banks." It may be observed here that Mr. Washburn, in his work on Easements, page 397, states that this rule is pretty generally received in the United States. The Court further held that it is not essential to the public easement "that the capacity of the stream as above defined should be continuous, or, in other words, that its ordinary state at all seasons of the year should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in
187 the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity continue a sufficient length of time to make it useful as a highway, it is subject to the public easement." I shall mention but one other case cited in the Monticello as expressing in a concise definition what seems to me to be the fair result of the leading authorities in this country on the question of navigability. In Hikok *vs.* Hine (23 Ohio, 523, 13 Amer. Rep., 255) it was held that "a river is navigable which is capable of floating to market the products of the country through which it passes or upon which commerce may be conducted, and from the fact of its being so navigable it becomes in law a public river or highway."

The actual use commonly made of North Wimbee creek during the past forty years by the proprietors of the six flourishing plantations bordering upon its banks in the transportation of their crops to market and of their return supplies demonstrates the navigable capacity of the stream for purposes useful to trade and agriculture, and my conclusion is that North Wimbee creek is a public navigable stream.

II. As to the title to the soil or bed of the creek and, first, as to the space between usual high and low water mark, defendants claim this portion of the bed of the creek under the grant to Stuart. The validity of the grant is disputed, it being maintained on the part of the State that the bed of a navigable stream in which the tide ebbs and flows is not "vacant land" within the meaning of the act of 1791 (5 Stats., 168), under which this grant purports to have been issued; and hence that it passed no interest in the soil of the creek below ordinary high-water mark. The authority of the Legislature to vest the title to such land in an individual is not controverted. The point made is, that lands of this character have been reserved from location and grant under the provisions of the statute regulating vacant lands, and that a special act of the Legislature is necessary to confer title in respect to such lands. Certainly no express reservation to this effect is to be found in any of the statutes
188 relating to the public land. Land, in its legal signification, comprehends soil covered by water. 2 Black. Com., 18, 19. The words "lands liable to rates" may extend to navigation, cuts, and canals, as well as to quays and wharves. Rex *vs.* Lud and Liverpool Canal Companies (7 Adol. and El., 685), per Patterson, J. "They are not the less land for being covered with water." Potter's Dwarris, 290. "Vacant lands, in the sense of our statutes, are lands

that have not been 'taken up' by individuals, nor appropriated to particular public purposes." Thus, by an act of 1795, section 15 (2 Stats., 101), lands escheated and reverted to the lords proprietors, under a former act, by reason of having "lain waste," and no rent having been paid, "shall be deemed, to all intents and purposes, as lands untaken up." By an act of 1734, section 7 (3 Stats., 292), lands not registered as therein required "shall be deemed, reputed, and taken as vacant lands," and it is declared lawful for any person "to take up the same." An act of 1785 (4 Stats., 404), recites, in preamble, that certain land was "not granted, but still vacant." An act of 1787, section 7 (5 Stats., 39), avoids grants of land for Sullivan's Island, Middle Bay Island, "or any other lands whatever, which have been or are now appropriated for any particular public purposes." In Thomas *vs.* Daniel (2 McC., 354) it was held, that land ceded to the State by the Cherokee Indians, with reservation of right to inhabit same during good behavior, was not vacant land, and a grant of such land was declared void. The court say: "Land appropriated by the Legislature is not vacant, be that appropriation what it may, to individuals, to public purposes, or to the Cherokee." In McKugh *vs.* Kinkins (2 Brev., 321) it was held that lands escheated to the State were not vacant lands, the ground of the judgment being that a public sale of such property was required by the statute regulating escheats. And in State *vs.* Arledge (2 Bail., 401), it was held that lands purchased by the State from a corporation to which they had been originally granted *was* not subject to grant as vacant land. The decision was rested on the authority of
189 the adjudged cases as to escheated land, without, it would seem, adverting to the special reason upon which they were based.

It appears, therefore, that there is nothing in the legal signification of the term "vacant land" to restrict its application so as to exclude land covered by water, which has not been appropriated to individual or public use, by authority of law.

That land flowed by the tide is the subject of grant in this State is conclusively shown by statutes, in which "all lands granted in this State" were classified and rated for purposes of taxation. The first of these was the act of 1784 (4 Stats., 627), to raise supplies. This classification was continued in the supply acts of each succeeding year until 1815, when it was made permanent by "An act to fix the value of lands in this State for taxation," etc. (6 Stats., 7). In these acts "tide swamp not generally affected by salt or freshets" and "salt marsh," proved to be "incapable of immediate cultivation," are set down, the first taking rank as the most valuable land in the State. There is no trace of any special legislation providing for the location and grant of lands of this character, and the necessary inference is that they were disposed of under the general regulations prescribed by the statutes relating to vacant lands.

An act of 1714 (7 Stats., 61 and 62, sections 3 and 5) recognizes claims of individuals, under grant or conveyance, to sundry lots on the bay in Charleston, "from high to low water mark," and imposes penalties and forfeiture for neglect by such claimants to build their

proportion of the sea wall. An act of 1719 (7 Stats., 69, sec. 20), reciting that owners of front lots on the bay were discouraged from building their part of the sea wall, by reason of others claiming lots before them to low-water mark, provides a mode of adjusting disputes, and declares that upon failure of the claimant of the lower lot to present his claim within a stated time said lot should be vested in the owner of the front lot, "he paying to the owner of the lot to the eastward, from high to low water mark, his full charges that he was at for his grant for the same," etc.; and section 22 provides that
190 upon the title to the front and lower lots becoming vested in the same person they should not again be separated, and if the front lot should be disposed of by sale or gift the other should go along with it as an appurtenance." An act of 1787 (5 Stats., 39, Sec. 4) allowed persons to carry off oysters and oyster shells below high-water mark from land for which surveys had been taken out, but not passed and confirmed by grants under the signature of the Governor since the opening of the land office by the act of 1784, and (section 6) allowed owners of wharves and low-water lots in Charleston exclusive privilege, for six months after the passage of the act, of obtaining grants for land covered by water in front of their wharves or lots as far as the western channel of Cooper river and the northern channel of Ashley river. By act of 1836 (7 Stats., 151) all vacant land not legally vested in individuals in the harbor of Charleston covered by water was vested in the city council of Charleston for public purposes, etc.

These citations from our statutes are, to my mind, conclusive of the question under consideration. They show unmistakably that lands below high-water mark in tidal navigable rivers have been uniformly recognized by the Legislature as embraced within the description of vacant lands, and subject as such to location and grant under the general regulations of the land office. This practical interpretation of its own language by the Legislature being in accordance with the comprehensive meaning which it bears in law, there would seem to be an end to the question whether a grant of land to low-water mark in the bed of a tidal navigable stream, issued in conformity to the provisions of the act of 1791, passed the title of the State to the grantor.

My conclusion is that defendants have valid title, under the grant of 1869 to Henry M. Stuart (from whom they derived), to the soil between ordinary high-water and low-water mark in said creek, embraced within the lines of said grant.

As to the title to the bed of the creek below ordinary low-
191 water mark, I hold that it is in the State. No express grant conveying this land has been produced; no long-continued acts of ownership in the bed of the creek have been shown in support of a prescriptive right. Angell, Tide Waters, 96; Tyler on Boundaries, 36.

The possession for forty years of the adjacent land by those under whom defendants claim undoubtedly raises the presumption of a grant coextensive with the limits of such possession. But to extend the boundary to the centre of the creek would be to overturn an established prin-

ciple of the common law, which has never yet been questioned by any court in England or this country. The tendency of American decisions has been to restrict riparian proprietorship, even upon navigable rivers above the tides, and not to enlarge it in respect to navigable streams in which the tide ebbs and flows. Wherever the common-law test of navigability has been repudiated the common-law consequences of navigability have been held to attach.

Nothing more can be claimed under the grant presumed from the possession of the upland than would result from an express grant calling for the creek as a boundary. Conceding that usage would carry the line to low-water mark, the principle on which it could be extended further upon the facts of this case is not to be found in the common law nor in any decision that has come within my notice.

The plaintiff is entitled to judgment in conformity to this decision. The order for judgment will be settled at chambers, upon motion of either party, opposite counsel being duly notified.

(Signed) JOHN J. MAHER.

192 *Opinion.*

The State of South Carolina. In the Supreme Court. November Term, 1881.

THE STATE OF SOUTH CAROLINA, Respondent,

vs.

CORBIN & STONE, Appellants.

SIMPSON, *C. J.:*

In this case the State brought action against the defendants for certain money collected by them as attorneys, to wit, for $28,000, less $3,700 allowed them in the complaint as a counsel fee.

The defendants, appellants, interposed objection to the action on the ground that it had been instituted by authority of the comptroller general, and they denied the right of the comptroller to authorize and of the attorney general to prosecute such action. This objection was overruled by the presiding judge. They then
193 denied that the money sued *sued* for had been collected by them in a certain proceeding against the "Oak Point Mines," in which they represented the State; that the circuit court had allowed them sixty-two and a half per cent. upon this amount, and that they were entitled to retain this much at least. The court left it to the jury to determine whether the whole amount in the hands of defendants had been recovered in that suit, or only a portion, to which the order of the circuit court referred.

For a further defense they relied on an alleged settlement made with T. C. Dunn, the then comptroller general, in which this matter had been adjudicated, and the balance due, to wit, $206.06, had been turned over to the State treasurer. They also set up various counterclaims and set-offs for services rendered the State as attorneys. These, on motion, without previous notice, were struck out
194 upon the ground that they constituted a cross-action, and that the State could not be held to answer thereto. Among these

counter-claims was one for a sum of money alleged to have been advanced to the treasury, which Treasurer Leaphart had taken credit for in accounting with and paying off the members of the General Assembly of 1876 & '7. The court refused to hear testimony on this subject, it being a counter-claim that could not be set up in the courts against the State.

The defendant Stone claimed to have acquired citizenship in New York before suit [was] brought, and upon a showing that he had instituted proceedings to remove the case to the circuit court of the United States, asked judgment of dismissal as to him. This was refused. The jury found a verdict for $23,728.44, with interest from July 8, 1876.

The defendants appealed from the rulings of the presiding judge above, and also from certain refusals to charge upon requests,
195 hereafter to be noticed and considered if necessary.

The important questions in the case are, first, Did the settlement made with Comptroller Dunn bar this action?

If not, then, second, Did the presiding judge err in submitting to the jury, as a question of fact, whether the whole amount in defendant's hands had been collected in the suit against the Oak Point Mines, and therefore subject to the order of the circuit court allowing defendants 62½ per cent. as a fee, or only a part of it? Third, Did the judge err in holding that the State could not be sued even by a counter-claim?

Before considering these questions, however, it will be proper to dispose of the question which lies at the threshold of the case, as to the authority of the attorney general to institute this action.

In 1873 attorney general Melton, under "an Act to fix the
196 salary and define the duties of the attorney general," Gen. Stat., p. 109, sec. 3, which empowers the att'y gen'l, when in his judgment the interests of the State require it, to file and prosecute proceedings against persons who intrude upon the the lands, rights, or property of the State, * * * commenced proceedings against the South Carolina Phosphate Co., Limited, *alias* the "Oak Point Mines Co.," for intruding upon the rights of the State, by mining and removing from North Wimbee creek, a navigable stream, phosphate rock, the property of the State, and prayed judgment for the value of the rock removed and for perpetual injunction, &c.

The appellants, with Att'y Gen'l Melton, represented the State. Under an order of the court in this proceeding, this company paid the appellants the sum of $28,000. Of this amount they paid to the treasurer, in June, 1877, $20,606, retaining the balance as fees for professional services, viz., $17,737.34 in that case and $10,-
197 056.60 in another.

Attorney General Connor, at the instance of Comptroller-General Hagood, in August, 1877, brought action to recover this money thus retained by appellants as counsel fees, claiming that appellants, under the order of the court hereafter to be considered, were entitled to retain only the sum of $3,700.

This action, thus commenced by Att'y Gen'l Connor, has been con-

tinued by Att'y Gen'l Youmans, and is the one now before the Court.

There can be no doubt but that Att'y Gen'l Melton, under sec. 23 of the act above referred to, Gen'l Stat., 110, had authority, on his own motion, to commence the action against the Phosphate Co., which resulted in the recovery of the money here sued for. This sec. is as follows: "He may, when, in his judgment, the interest of the State requires it, file and prosecute information or other
198 process against persons who intrude upon the lands, rights or property of the State." This gave Att'y Gen'l Melton full authority to act in the original suit, and we think the act is wide enough to vindicate the action of Att'y General Conner in instituting this suit and Att'y Gen'l Youmans in prosecuting it. This suit may well be regarded as an incident to the action against the Phosphate Co. It was intended to gather the fruits of that action, and was rendered necessary as a result thereof. Besides, if the appellants illegally withhold the State's money, claimed at their hands, why is not this a violation of the act above cited? Money is property, and if appellants are illegally in possession of the State's money and refuse to deliver it, why, in contemplation of law, may they not be regarded as having intruded themselves upon the property of the State, and thereby made themselves liable under the act
199 above referred to.

But, in addition to this, the att'y gen'l is especially required to "defend the rights of the State in all cases where its rights are involved." Sec. 35, G. S., 110.

The prosecution of a claim in behalf of the State is defending its rights. In fact, inasmuch as the State is seldom or never a defendant in a cause, the only, or at least the general, way in which he may be called upon to defend its rights is by prosecuting its claims as plaintiff.

But still, in addition, it appears that Att'y General Conner reported this action to the Gen'l. Assembly. The same report was made by Att'y Gen'l Youmans after he took charge of the case. Even then, if legislative authority was required, the failure of the General Assembly to condemn or disapprove, after two formal reports, on the familiar doctrine of principal and agent, would amount to a confirmation. This objection cannot be sustained.

200 Next, Was comptroller general Dunn authorized to make the settlement relied on by the appellants, as — accord and satisfaction?

If the comptroller had such power it should be found in the acts creating the office and defining its duties. There are no common-law powers attached to this office. On the contrary, the comptroller is a constitutional officer, having only such powers and duties as have been or may be provided by law. Art. 111, sec. 23, Const. We have not been cited to any act in which such power is expressly delegated, nor in which such duties are imposed as would, by necessary implication invest him with such power. Nor have we been able to find any act of the kind. We conclude, therefore, that no such act exists. But even if one could be found would it be constitu-
201 tional? The Legislature might authorize the comptroller or any other officer to audit and determine claims against the

State, but could it empower such officer to direct payment and satisfaction in the absence of a regular appropriation?

Sec. 12, art, 9, Const. " provides in brief and express terms that no money shall be drawn from the treasury but in pursuance of appropriation made by law." This section stands directly in the way of the settlement of Comptroller Dunn as an account and satisfaction, even if he was authorized to adjudicate the claim of defendants. The adjudication, even if legal, did not authorize appellants to retain the money in payment of *their* claim.

No officer of the State is empowered to appropriate the public money in this shorthand way. The General Assembly makes the appropriation, the comptroller draws his warrants, and the
202 treasurer pays. This may seem somewhat formal and technical, especially where the creditor has the money already in his hands, but experience has taught that it is the best to be particular in reference to public funds. Some forms must be observed and some checks interposed. These have been required with us, and no power has been given to any officer to dispense with them.

Next, Did the circuit judge err in submitting to the jury the question whether the order of Judge Maher allowing appellants a 62½ per cent. on the amount collected covered the entire amount received or only that part received under the first judgment?

The original action against the phosphate Co. was brought to recover damages on account of phosphate rock dug previous
203 and up to the date of the action, and for perpetual injunction. This action was instituted in 1873. On the 21 July, 1875, a decree was filed in this action giving judgment to plaintiff for $5,984, being the value of rock mined up to the commencement of the action; at the same time it was further ordered that the company be enjoined from continuing their mining operations until they complied with the act of March, 1870, sec. 3. On the same day a second order was filed directing the referee to ascertain and report the quantity of rock mined by the company pending the litigation, the company having been permitted to mine during the litigation under an arrangement agreed upon. On November the 9, 1875, the referee reported under this last order that 22,016 tons had been mined while
204 the suit was pending, in addition to that for which judgment had already been granted. On November the 11, 1875, the court confirmed this report of the referee, and ordered the company to pay to plaintiff's attorneys the sum of $22,016, and also the sum of $5,984, previously adjudged to plaintiff. In October, nearly a month before this last report in November and its confirmation by the court, the judge, on motion of the appellants, and upon the suggestion of Attorney General Melton, referred to Asher D. Cohen, Esq., the matter to determine and report what per cent. of the fund collected in the above-entitled cause would be proper compensation to be paid to Messrs. Corbin & Stone for their professional services therein.

It will be observed that when this order was made no money had actually been collected, but judgment had been rendered for
205 $5,984, the value of the rock mined up to the commencement of the action, and which was the result of the suit proper

Mr. Cohen, October 28, 1875, reported, recommending 62½ per cent. of the fund collected in the case as a suitable fee. This report was confirmed by Judge Maher November 4, 1875, all this being before the decree of November 11, giving judgment for $22,016 for the mining during litigation, and after the judgment for $5,984, the value of the rock mined up to the beginning of the action.

Now, the question before Judge Hudson, upon these facts was, Did Judge Maher intend to subject both of these amounts to the 62½ per cent. as appellant's counsel fee, or did he intend to apply this measure to the $5,984 only, which was the product of the suit proper? In the extract from Judge Hudson's charge, found in the exceptions, it does not clearly appear what precise question he submitted to the jury.

It is unfortunate that the whole charge has not been fur-
206 nished. The brief is exceedingly voluminous as to other matters, but it is meagre as to the charge of the judge, and the court has had some difficulty in determining the exact question submitted. It was the province of the court to construe the order of Judge Maher and to submit to the jury such questions of fact as arose thereon, and, as we understand the charge, this is what Judge Hudson did. He construed the order to mean that the counsl fee was to come from the product of the action proper, and he submitted to the jury, as a question of fact, the question, what fund had been collected in that action, stating to them at the same time that the $22,016 was the result not of the action, but of an intermediate arrangement to prevent suit. We see no error in this; but even if there was we do not see that it should effect the result of this case.

Admit that it was the purpose of Judge Maher's order to fix
207 the fee at 62½ per cent. of the whole amount collected, $28,000, could that order, thus interpreted, have been allowed as a defence to this action, brought to recover money in the hands of appellants belonging to the State? We think not. Judge Maher, provided he had jurisdiction of such question, might have settled the amount of the claim due appellants, but would that have authorized Judge Hudson to direct his jury to give appellants credit for that amount in the action before him? This would have been an appropriation of the State's money by the court, when the constitution says that no money can be appropriated except by the General Assembly.

But did Judge Maher have legal authority to adjudicate appellants' claim against the State? We know of no act or law which gives the courts of the State jurisdiction to audit claims of this kind. The order of Judge Maher amounted to nothing more than an audit.

It simply adjudged the value of the services, fixing 62½ per
208 cent. of the amount "collected in the suit" as proper compensation. It did not order payment, nor could it have done so legally, and for the same reason Judge Hudson was powerless to have this amount credited on the funds in the hands of appellants. If the order of Judge Maher was final and conclusive as to the amount of the fee, the appellants should have paid the money collected by them into the treasury of the State, and have gone before the Legislature with this order and had their claim incorporated

in the appropriation bill. Under this view of the case, as the order of Judge Maher could in no event have been a good defence to this action, it is immaterial what question Judge Hudson submitted to the jury arising thereon.

Next, did the judge err in holding that the State could not be sued in her own courts, and on that ground in ruling out the counter claims of appellants? It is hardly necessary to discuss the
209 question as to the right of an individual to sue the State directly. That no such right exists is universally admitted. However righteous, just, and meritorious the claim may be, the courts can afford no remedy. The State, in her sovereignty, will do justice at her own will, and not by the intervention of her courts. The courts are of her own creation, and for her citizens. Treasury *vs.* Cleary, 3 Rich., 374; State *vs.* Baldwin, 14 S. C., 138. But it is said that this is a discount or counter claim, and not a suit. In Treasury *vs.* Cleary, *supra*, that question was made, and the Court said "a discount is nothing else that a modified form of suit, in which defendant claims of the plaintiff some right which he might enforce in a suit at law."

In the State *vs.* Baldwin, *supra*, McIver, A. J., for the Court said: "The State cannot be sued in its own courts, nor can the de-
210 fendant interpose such claims as a discount or set-off, which is nothing but a cross-action to an action brought against him by the State. He said further, one who renders service to the State for which there is no compensation provided by statute cannot, as in the case of services rendered to a private person, raise an implied assumpsit against the State, and for such services he has no legal claim which can be enforced by process of law."

The discount allowed in the case of the State *vs.* Gaillard, 1 Bay., 500, was especially provided for under the amercement acts, and that case has no general application. The cases referred to by appellants' counsel from the Supreme Court of the United States in our opinion are inapplicable. They were all more or less influenced by the act of Congress March 3, 1797, providing for discounts, legal and equitable, against the United States, under certain circumstances and conditions.

211 True, in some of the cases, it is stated that the act did not create the right of discount, but simply recognized it as pre-existing, and that the act was intended to *to* regulate and control it; but, still in reading the cases, we cannot fail to see that the act was relied on as the foundation. Besides, in some of the cases, the claim set up by defendant was for services rendered under contract well defined and the fees fixed by law. In others for a *pro rata* share of funds in possession of the Government, in which the defendants claimed an interest differentiating these cases from the case now under consideration. Thus, in the case of U. S. *vs.* Mann, 2 Brockenborough, 10, the defendant's claim as deputy marshall was founded upon services which his office required him to perform under law, the fees being fixed by statute.

In the case of U. S. *vs.* Wilkins, 6 Wheaton, 144, Judge
212 Story said: "We think it a reasonable construction of the act

(referring to the act of 1797) that it intended to allow the defendant the full benefit, at the trial, of any credit, whether arising out of the particular transaction for which he was sued or out of any distinct and independent transaction which would constitute a legal or equitable set-off of the debt sued for by the U. S."

In the case of Siren, 7 Wallace, 154, where Mr. Justice Field lays down the doctrine more broadly in favor of appellants' position than in the other cases, the proceeding was *in rem*. and the Court permitted the claims of individuals to be established against the property libelled, although adverse to the claim of the U. S. Judge (Justice) Field, it is true, placed this right broadly on the ground of set-off, saying: "That although direct suit cannot be maintained against the United States or against their property, yet when the
213 United States institute suit they waive their exemption so far as to allow a presentation by the defendant of set-off legal and equitable to the extent of the property demanded." But we do not see that this declaration was necessary to the case and the judgment rendered.

The "Siren" had been condemned by the court at the instance of the Government, and the proceeds having thus been placed in course of judicial administration, it was held that any proper claim prior to that of the Government might well be paid out of such proceeds. We do not see that this presented a case of discount or set-off.

In the case from Kentucky—The Sinking-Fund Commission *vs.* Norther- Bank—the State had sold property to the defendant with a mortgage over it. The court allowed the defendant a reduction out of the purchase-money sufficient to remove the incumbrance.
214 The case in 18 Ga., 662, Powers *vs.* Central Bank, is placed squarely on the right of discount, but Judge Simpkin seems to have reached his conclusion with hesitation and doubt, and fran'kly suggested at the conclusion of his opinion that it would be well for the State Legislature to pass an act similar to the act of Congress, expressly allowing defendants to discount legal and equitable claims against the State. From a note appended to the case it would seem that it did not give satisfaction.

But whatever may have been decided elsewhere, in the face of our own cases, of the State *vs.* Cleary and the State *vs.* Baldwin, we cannot do otherwise than to hold that the claim of appellants had no legal status in the court below. It is universally admitted that a State cannot be sued in its courts without its consent. Our courts have decided that a counter-claim is a suit. It is so recog-
215 nized in this case by the appellants in their motion for judgment on the failure of the State to answer their counter-claim, and cannot be set up. There can be no doubt, however, that there is an underlying principle of justice which might permit defendants under proper regulations to have their claims against the State, if any, considered and passed upon by the same tribunal before which they may *must* be summoned to answer the State; and, if we might presume to suggest, it may be wise for the General Assemply to

enact some remedy in such cases. Until then we must declare the law as it stands. Our province is judicial, not legislative.

The defendant, Stone, sought to remove this case as to himself into the circuit court of the United States for the dist. of South Carolina on the ground that at the commencement of the suit he was a citizen of New York. The petition presented for that purpose and
216 the bond filed were in form correct, but no order was granted by the circuit court, Judge Shaw, before whom the motion was made, having died without acting thereon, and the motion was not renewed thereafter.

The attorney for Stone, however, filed copy of the proceedings in the circuit court of the United States. Thereafter, in 1880, Attorney Gen'l Youmans moved that court to have the case stricken from its docket, but no decision has been rendered on that motion. Under this state of facts Judge Hudson refused the motion, and ordered the trial to proceed against both defendants. We think he was right.

We do not see that the United States circuit court has anywhere been given jurisdiction in a controversy between a State and a citizen of another State on the ground of the citizenship of the parties. That court has jurisdiction only as has been conferred by the
217 act creating it, and the amendments thereto. We have been pointed to no act conferring such jurisdiction as contended for here.

The Constitution of the United States has conferred this jurisdiction upon the Supreme Court, but nowhere do we find it conferred upon the circuit courts. The reason seems to be founded in the dignity of a State. Respublica *v.* Coblet, 3 Dallas, 467. In the Railroad Co. *vs.* The State of Miss., Otto XII, 136, the case was removed to the circuit court, but this was on the ground that the controversy involved the construction of an act of Congress.

It belonged to that class of cases where jurisdiction is conferred, because arising under the Constitution or the laws of the United States. It affords no authority for the motion made here; besides it does not appear, except in the statements of the petition, that defendant, Stone, was a citizen of New York when the action
218 began. The circuit court, then, not having jurisdiction in a case like this, it was not subject to removal under the acts of Congress providing for the removal of causes to the United States circuit courts. Dillon, p. 10, *et seq.*

We do not think the court below was in error in admitting the oral demurrer interposed by plaintiff to the counter-claims of defendants. This demurrer raised the question of jurisdiction. This question, under sec. 171 of the Code, like that, "That the complaint does not state facts sufficient to constitute a cause of action," is expressly reserved from waiver, although no objection be taken by formal demurrer or answer. The cases referred to by appellants' counsel in 12 S. C., 592 and 56, do not controvert this proposition. There the objection was such as required a formal demurrer.
219 Neither do the cases of Bank *vs.* Zorn, 14 S. C., 450, and Cooks *v.* Fraser apply. There the motion was to strike out the answers, not for the want of jurisdiction, but for other causes.

The exceptions involving inadvertant remarks made by the judge must be overruled. These remarks were not strictly upon the facts at issue, and therefore contrary to the inhibition of the Constitution. At most they were irrelevant, and, as is said in the exception, inadvertant—certainly not so material as to afford ground for a new trial.

The judgment of this court is that the judgment of the circuit court be affirmed.

We concur.

HENRY McIVER, *A. J.*
S. McGOWAN, *A. J.*

Filed 7th March, 1882.

I certify that the foregoing 28 pages contain a true copy of the original now on file in my office.

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk of Supreme Court of South Carolina.

220 [Endorsed:] South Carolina supreme court, Nov'r term, 1881. The State of So. Ca. *vs.* Corbin & Stone. Opinion. W. D. Simpson, C. J. (Copy.)

221 The United States of America to the State of South Carolina Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of South Carolina, wherein Corbin and Stone are plaintiff- in error and you are defendant in error, to show cause, if any there be, why said judgment rendered against the said plaintiff- in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the said William Stone in that behalf.

222 Witness the Honorable William D. Simpson, chief justice of the supreme court of the State of South Carolina, this fifteenth day of March, in the year of our Lord one thousand eight hundred and eighty-two.

W. D. SIMPSON, [L. S.]
Chief Justice Supreme Court, South Carolina.

223 On this twelvth day of April, in the year of our Lord one thousand eight hundred and eighty-two, personally appeared Baylis T. Earle, before me, the subscriber Albert M. Boozer, clerk of the supreme court of South Carolina and notary public of said State, and makes oath that he delivered a true copy of the within citation to Honorable Leroy F. Youmans, attorney general of the State aforesaid, by leaving a copy of the same at his office on 12th April, 1882.

BAYLIS T. EARLE.

Sworn to and subscribed the twelfth day of April, A. D. 1882.

ALBERT M. BOOZER, [L. S.]
Clerk of Supreme Court of S. C., Notary Public of S. C.

A true copy.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk of Supreme Court of South Carolina.

224 [Endorsed:] The United States of America. Supreme Court. William Stone, plaintiff in error, ag'st The State of South Carolina, def't in error. Citation.

225 The State of South Carolina, Supreme Court. Writ in Error

WILLIAM STONE, Plaintiff in Error,
against
THE STATE OF SOUTH CAROLINA, Defendant in Error.

It is ordered that the supersedeas bond of the plaintiff in error, William Stone, in the above-entitled case, as required by the act of Congress in such cases made and provided, be fixed at the sum of fifty thousand dollars.

April 5th, 1882.

W. D. SIMPSON, *C. J.*

A true copy.

Attest:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk of Supreme Court of South Carolina.

226 [Endorsed:] The State of South Carolina. Supreme Court. William Stone, plaintiff in error, *ag'st* The State of South Carolina, defendant in error. Order as to writ in error bond.

227 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

THE STATE OF SOUTH CAROLINA, Plaintiff,
against
CORBIN and STONE, Defendants.

I, Albert M. Boozee, clerk of the said court, in obedience to the annexed writ of error, do hereby certify that the annexed pamphlet of one hundred and six printed pages, including the cover, the fly-leaf, and two pages of index, and one hundred and two other pages of printed matter, and the twenty-eight pages of manuscript opinion of the said court, and three other written pages of citation and supersedeas &

bond order, constitute a correct, true, full, and complete transcript of the record of said case as the same is on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of my office at Columbia, in said State, on this 26th day of May, in the year of our Lord one thousand eight hundred and eighty-two.

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZEE,
Clerk of Supreme Court of S. C.

Endorsed on cover: S. Carolina Supreme Court. No. 144. William Stone, plaintiff in error, *vs.* The State of South Carolina. Filed 24th October, 1882.

117-430

FEB 25 1886
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM 1885.

No. 144.

WILLIAM STONE, Plaintiff in Error,

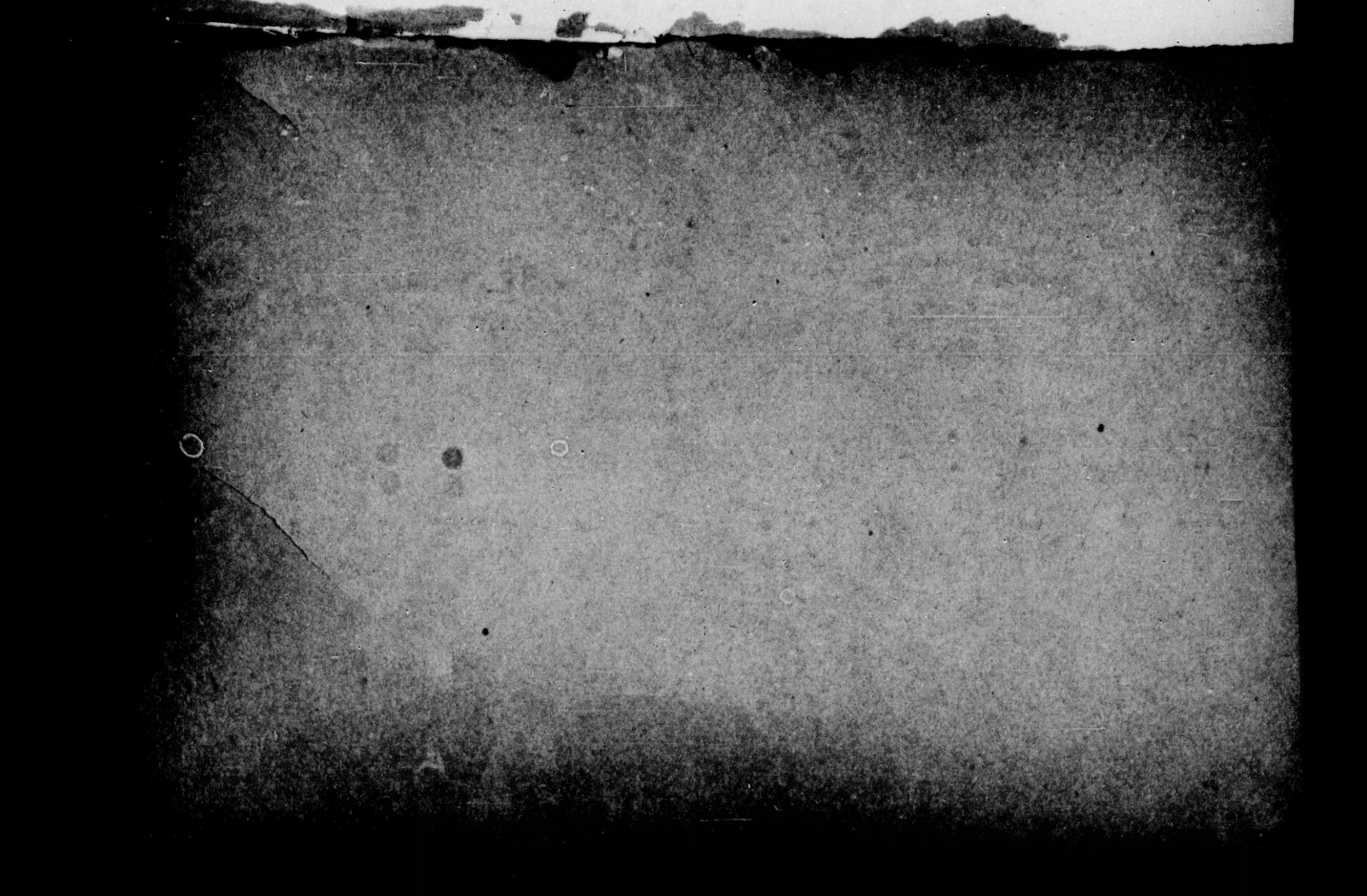
vs.

THE STATE OF SOUTH CAROLINA.

REMOVAL OF CAUSES.

WM. E. EARLE,
Attorney for Plaintiff in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.



Supreme Court of the United States.

October Term 1885.

WILLIAM STONE, Plaintiff in Error,
vs.
THE STATE OF SOUTH CAROLINA. } No. 144.

The writ of error herein brings up but a single question, to wit, whether the State court could legally proceed after the cause had been removed, in strict conformity with the statute, to the Circuit Court of the United States. The contention of the plaintiff in error is that the Circuit Court of the United States has in the first instance exclusive jurisdiction of the question of whether the case is removable under the statute.

STATEMENT OF THE FACTS.

The following extract is from the opinion of the Supreme Court of South Carolina, (Record, p. 129, fol. 216, 217,) to wit:

"The defendant, Stone, sought to remove this case as to himself into the Circuit Court of the United States for the district of South Carolina on the ground that at the commencement of the suit he was a citizen of New York. *The petition presented for that purpose and the bond filed were in form correct*, but no order was granted by the Circuit Court, Judge Shaw, before whom the motion was made, having died without acting thereon, and the motion was not renewed thereafter.

The attorney for Stone, however, filed copy of the proceedings in the Circuit Court of the United States. Thereafter, in 1880, Attorney General Youmans moved that

court to have the case stricken from its docket, but no decision has been rendered on that motion. Under this state of facts Judge Hudson refused the motion, and ordered the trial to proceed against both defendants. We think he was right.

We do not see that the United States Circuit Court has anywhere been given jurisdiction in a controversy between a State and a citizen of another State on the ground of the citizenship of the parties.

That court has jurisdiction only as has been conferred by the act creating it, and the amendments thereto. We have been pointed to no act conferring such jurisdiction as contended for here.

The Constitution of the United States has conferred this jurisdiction upon the Supreme Court, but nowhere do we find it conferred upon the Circuit Courts. *The reason seems to be founded in the dignity of State.*"

1. The State of South Carolina began an action against David T. Corbin and William Stone, who composed the law-firm of Corbin & Stone, on August 1st, 1877. (Record, fol. 29, p. 18.)

2. On December 27th, 1877, William Stone, a citizen of New York, accepted service at the city of New York, reserving the right to remove the case to the Circuit Court of the United States. (Record, fol. 6, p. 3.)

3. William Stone filed his petition and bond for the removal of the case on April 27th, 1878. (Record, fol. 7, pp. 3, 4, 25.)

4. During the spring term 1878 the motion to remove under said petition was argued before the Circuit Court of the State by Mr. Earle for petitioner, and Mr. Attorney-General Youmans contra; but no order was made. (Record, fol. 11, p. 6.)

5. That on November 17th, 1878, and within the time fixed by the statute, William Stone filed in the Circuit Court of the United States a copy of the record in the Circuit Court of the United States for the district of South

Carolina, and the cause was placed on the calendar of said court. (Record, fol. 12, p. 7.)

6. That two years thereafter, to wit, in April, 1880, the State by its Attorney-General made a motion in the Circuit Court of the United States to remand the cause to the State court, and thereon no decision has been filed. The grounds of this motion were—1st, that the State was a party; 2d, that it was not a case in which a several judgment could be rendered. (Record, fol. 11, p. 6.)

7. That at the opening of the trial in July, 1880, the plaintiff in error called the attention of the court to the record of removal, and moved the court that an entry be made on the record that the case as to him had been removed to the Circuit Court of the United States. Which motion was refused and the cause was tried, resulting in a verdict against him for $23,728.44.

Assignment of Error.

The State court erred in forcing a trial as to William Stone pending the decision of the motion of the Attorney-General in the Circuit Court of the United States to remand the case to the State court.

BRIEF.

The case having been removed in strict conformity with the statute, and the Attorney-General having moved in the Circuit Court of the United States to remand, and no decision having been made thereon, the question now is simply whether the State court had jurisdiction of the cause?

The question is answered conclusively by the answer to another, viz.: When a case is removed under the statute and the record filed in the Circuit Court of the United States and placed upon its calendar, which court has juris-

diction of the question whether the case is a proper one in law for removal?

The statute has in express terms answered this question. It answered it negatively as to the State court in these words: "It shall then be the duty of the State court to accept said petition and bond, and proceed no further in said suit." (See 3d Chap. 137, S. L. 471, part 3.)

And it has answered it affirmatively as to the United States court in these words (Sec. 5 of same act): "That if in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said CIRCUIT court at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

This court has repeatedly had this question before it, and its decisions are uniform and unconflicting.

In Kern *v.* Huidekoper the plaintiff in error filed his bond with a petition for the removal of the cause, and it was denied by the State court, but he nevertheless filed his transcript of the record in the Circuit Court, proceeded to judgment, and the case was brought here by writ of error, and this court said (103 U. S., 490):

"The jurisdiction was, of course, originally in the State court. It is unnecessary to decide whether the State court rightfully or wrongfully denied the first two petitions of the defendants in error for the removal of the cause. The petition for its removal, filed July 6th, 1877, contained every

averment required by law. It was filed at the proper time, and it was accompanied by a bond, with good and sufficient surety, conditioned according to the statute." "According to the terms of the act of Congress it was the duty of the State court 'to accept said petition and bond, and proceed no further in such suit.' Act of March 3d, 1875, c. 137, sec. 3; 18 Stat., pt. 3, p. 470."

In the case of Steamship Company *v.* Tugman, (106 U. S.,) the plaintiff in error, after the refusal of his petition in the State court, went on and defended, as we have done, and on page 122 this court says: "Whether the Circuit Court of the United States would retain jurisdiction, or dismiss, or remand the action because of the failure to file the necessary transcript, *was for it, not* the *State* court, to determine." And this for the reason that "in advance of the filing of the transcript, from the moment it became the duty of the State court to accept the bond and proceed no further," the jurisdiction of the Federal court attached.

Again, and on same page, this court says: "But the inferior State court having ruled that the right of removal did not exist and that it had jurisdiction to proceed, the company was not bound to desert the case and leave the opposite party to take judgment by default."

In the case of the Railroad Company *vs.* Koontz, 104 U. S., this court says: "The right to remove is derived from a law of the United States, and *whether a case is made for removal* is a Federal question," (page 15.) Again (on page 14) you say: "We have uniformly held that if a State court wrongfully refuses to give up its jurisdiction on a petition for removal and forces the party to trial, he loses none of his rights by remaining and contesting the case on its merits;" and you cite Insurance Company *vs.* Dunn, 19 Wall., 214; Removal Cases, 100 U. S., 457; Railroad Company *vs.* Mississippi, 102 U. S., 135.

In Railroad Company *vs.* Mississippi, (102 U. S., p. 141,) you say: "It (the State court) was entirely without juris-

diction to proceed *after the presentation* of the petition and bond for removal." And again: "It is scarcely necessary to say the railroad company did not lose its rights *to raise this question of jurisdiction* by contesting the case, upon its merits, in the State court after its application for the removal of the writ had been disregarded."

The sole question then is, which court had jurisdiction of the only question then involved, to wit, whether the cause was properly removable and legally removed?

That jurisdiction was exclusively vested in the Federal court. This fact was thoroughly recognized by the Attorney-General when he in that forum made his motion to remand to the State court.

He was bound to have abided the result of that motion. From the decision of that court a writ of error to this court could have been sued out by either party. That was not only the lawful course but would have been in the interest of the legal and orderly administration of justice. The subsequent course of the State court was an unwarranted assumption of authority, and all of its proceedings were *coram non judice*. "The duty of the State court was to proceed no further in the cause." (Steamship Company *v.* Tugman.) Or, to adopt the language of Mr. Justice Swayne in Insurance Company *v.* Dunn, 19 Wall., 224, "the further proceedings of the Common Pleas was a clear case of usurped jurisdiction. The illegality was gross."

Our petition and bond were all regular, according to the statute and in time. In the Removal Cases (100 U. S., at page 471) "the petition was not signed," but no objection thereto was taken in the State court, and this court says it came too late in the Circuit Court. As to the acceptance of the bond with "good and sufficient" surety by the State court, this court says (page 472) "that court has no discretion in such a matter." We have a right to the judgment of the Circuit Court of the United States upon the question of the jurisdiction of that court of this case. If it is in our

favor the Attorney General may have it reviewed here; if it be adverse to us we have the same right. To this end we shall await the decision of the motion of the Attorney General in the Federal court, or the renewal of it. This position is fully sustained by the judgment of this court in Railroad *v.* Koontz, which directed the Court of Appeals of Virginia to reverse the judgment of the Circuit Court of the county, and instruct it to vacate all orders and judgments made after the filing of the petition for removal and the approval of the bonds, "and to proceed no further therein, unless its jurisdiction be restored by the *action of the Circuit Court of the United States* or this court."

To the same effect is the unbroken line of decisions back to Gordon *vs.* Longest, (16 Peters, 104,) decided in 1842, which this court says was the first instance known to it of a State court refusing to a party his right to remove. In that case the court, speaking by Mr. Justice McLean, says: "From the decision of the State judge he seemed to consider the application for the removal of the cause as a matter to be decided by his discretion. But he must exercise a legal discretion. The defendant was entitled to a right under the law of the United States; and, on the facts of the case, the judge had no discretion to withhold that right; no objection can be made to the form of the application nor to the facts on which it was founded. This being clear, in the language of the above act, it was the duty of the State court to proceed no further in the cause. And every step subsequently taken in the exercise of a jurisdiction in the case, whether in the same court or in the Court of Appeals, was *coram non judice*."

It is not necessary to argue the objection that the Circuit Court of the United States has not jurisdiction of a suit between a State and a citizen of a foreign State. The records of this court show that many of such suits have been entertained and determined by the Circuit Courts as

courts of original jurisdiction, and such jurisdiction was expressly conferred by the act of March 3, 1875.

It is true that a sovereign State cannot be sued without its consent. This is inherent in sovereignty—inherent for more substantial reasons than those "founded in the dignity of State." Government could not be maintained if its revenue were liable to be paid away upon the uncertain results of litigation. And, without going into abstract reasons, the principle is well recognized. When, however, the sovereign, whether it be the United States or one of the sovereign States, goes into court, common reason and common justice require that it should go there upon equal terms.

The sovereignty is not to be made the cover for unwarranted aggression. That which was a shield can not be made a sword.

When the sovereign goes into court with a citizen of another sovereign there are peculiarly strong reasons why that foreign citizen should be entitled to transfer the litigation to a Federal tribunal where the judiciary do not hold their warrant of authority from one of the litigants.

The right stands upon exactly the principle that when a sovereign adopts the use of judicial proceedings it is supposed to consent to lay aside its sovereignty to the extent of allowing a discount, an off-set, a counter-claim. This is a well-settled principle; but, in view of the position of the Supreme Court of South Carolina in its denial of the right of removal in cases in which the State is a party, I may be excused for citing a few cases showing the rulings of other courts upon the status of a sovereign when invoking judicial proceedings.

In Carr *v.* The United States, in 98 U. S., pp. 438-9, the court says that The Siren and The Davis stand upon the principle "that when the Government itself seeks its rights at the hands of the court, equity requires that the rights

of other parties interested in the subject-matter should be protected."

In the case of The Siren, 7 Wall., 153, Mr. Justice Field delivering the opinion of the court says: "But although direct suits cannot be maintained against the United States, or against their property, yet when the United States *institute a suit* they waive their exemption so far as to allow a presentation by the defendants of set-off, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem* they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings with reference to the rights of defendants or claimants precisely as private suitors, except that they are exempt from costs and from affirmative relief against them beyond the demand or property in controversy."

Now, this right of set-off against the Government has always been recognized as lawful, because dependent on principles of equity, justice, and honesty. It does not grow out of or rest upon a statute. In the case of United States *v.* Mann, 2 Brockenbrough, which was a motion to attach a marshal for refusing to pay over money collected on an execution, on the ground that the Government owed him fees, Chief Justice Marshall refused the motion, and (at page 13) says of the act of 1797: "By examining the act referred to, we perceive that it gives no right whatever to use any discount, but regulated and restrained a right *recognized as already existing*."

The same doctrine was declared by Justice Story when delivering the opinion in U. S. *v.* Wilkins, 6 Wheaton, 42; he says: "*Independent of any statutory provision*, the defendant would have a right to show that he had accounted for the value of such advance by delivering the equivalent provision for which it was originally intended."

The case of The U. S. *v.* Buchanan, Crabbes' Reports, 572, was a suit against a purser of the Navy for

money in his hands belonging to the Government, to which he pleaded a discount for commissions on drafts drawn by him, and damages for losses sustained by rulings of his Commodore, construing the Navy Regulations erroneously. Judge Randall in this case says: "No action can be maintained by an individual against the United States. The only remedy for a claimant whose accounts have been rejected is either to apply to Congress or, by retaining money of the Government in his hands, to compel the United States to commence a suit against him, and then his whole demand may be examined by way of a set-off or equitable defense, provided it has been previously presented to the Treasury Department and has there been disallowed."

In The United States *v.* Ripley, 7 Peters, 25, the court says: that "The powers of the court and jury to admit credit against a demand of the Government were not limited to items which should have been allowed by the Auditor. That in all cases where an equitable claim against the United States is set up by a defendant, *which under the circumstances should have been allowed* by an exercise of the discretionary powers of the President or the head of a department, it should be submitted to the jury, under the instructions of the court."

If the sovereign upon going into court so far waives its attributes as to become liable to counter-claim (which is only a cross-action) as a matter of common right based upon general principles, surely when the defendant is a citizen of another State, a foreign State, that citizen cannot be deprived of the right of removal. A right which becomes the more important when the State which appoints the judges and selects the jurors is the pursuing litigant.

By Section 2 of Article III of the Constitution of the United States, it is provided that: "The judicial power

shall extend * * * to controversies * * * between a State and citizens of another State."

The dignity of a sovereign State is naturally jealous of, and repels any interference in her matters of local self-government. But that sovereignty which can use judicial procedure upon such unequal terms that its dignity cannot tolerate a counter-claim; that sovereignty which can use judicial procedure against a citizen of another State, but whose dignity prevents it from allowing him his rights under the supreme law of the land, is so sublimated, so transcendentally etherealized, that it leaves the domain of jurisprudence for the realm of fancy.

WM. E. EARLE,
Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 144.

WILLIAM STONE, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH CAROLINA, DEFENDANT IN ERROR.

POINTS AND AUTHORITIES OF CH. RICHARDSON MILES, ATTORNEY-GENERAL OF SOUTH CAROLINA, FOR DEFENDANT IN ERROR. 1

I.

It is not disputed that in a case entitled to be removed under the Act of Congress of 1875, upon filing the petition for removal, in due time, accompanied with proper surety, the jurisdiction of the State Court ceases. But it is submitted that where the petition in connection with the pleadings does not show that the case is removable under the Act of 2
Congress, the jurisdiction of the State Court is not ousted, and its subsequent proceedings, if it refused to order the removal, would not be void, or erroneous.

Dillon on Removal of Causes, 69, and cases cited.

II.

This case was not removable under the Act of 1875.

The second section of the Act of 1875 gives the right of removal in respect of *subject matter, without reference to citi-* 3
zenship, of any suit of a civil nature in law or equity involv-

ing over $500—(1) *arising under the Constitution or laws of the United States;* or (2) in which the United States shall be plaintiff or petitioner; and in respect of *citizenship without regard to subject matter,* (1.) in any suit in which there shall be *a controversy between citizens of different States;* or (2) a controversy between citizens of the same State claiming lands under grants of different States; or (3) a controversy
4 between citizens of a State and foreign States, citizens or subjects.

First. In order to sustain the right of removal of a case as one "arising under the Constitution or laws of the United States," there must be some question involved in the case, depending for its determination upon the correct construction of the Constitution, or some law of Congress. Dillon, pp. 26, 32, 33.

"Cases arising under the laws of the United States, are
5 such as grow out of the legislation of Congress."
Railroad Co. v. Mississippi, 102, U. S., 141.

Where it is sought to remove a case on this ground, it should appear from the pleadings or the petition for removal, or both, that the case is one of this character, and unless they appear in the pleading, the *facts* which show the case to be one of Federal cognizance must be stated in the petition; it is not sufficient to state generally that the case is one arising under the Constitution or laws of the United States.
6 Dillon, p. 64, and cases cited.
Gold Washing Co. vs. Keyes, 96 U. S., 199.

The pleadings (complaint, Transcript, p. 18. Answer of Corbin, p. 22. Answer of Stone, p. 40), and the Petition for removal (Transcript, p. 4), show that no such question is involved or alleged.

Second. Where the suit presents a case arising under the Constitution or laws of the United States, the right of removal
7 being given by Act of 1875, in respect of the *subject matter,* irrespective of citizenship, such case may be removed to the

Circuit Court of the United States, if the other jurisdictional conditions exist, although the suit is brought by a State.

Railroad Company v. Mississippi, 102 U. S., 135.
Ames v. Kansas, 111 U. S., 449.

But where a suit is brought by a State, and is not a case arising under Constitution or laws of the United States, it cannot be removed to the Circuit Court of the United States, 8
because that Court has not jurisdiction of such case.

(See opinion of the Supreme Court of South Carolina. Transcript, p. 29, f. 216–218.)

Although the Constitution of the United States gives a broader extent to the judicial power, the actual jurisdiction of the Circuit Courts is governed by the Acts of Congress.

And Congress has not, except by the Act of 1875, in relation to cases arising under the Constitution and laws of the United States, extended the jurisdiction of the Courts of the United States to cases between a State and its own citizens, 9
or citizens of other States.

Den ex dem the State of New Jersey vs. Babcock, 4 Wash. C. C. 344.
Brightley's Digest, Laws of U. S., 127, note D.
Desty's Federal Procedure, §653, §639.

Third. This case is not removable under the Act of 1875 because it is not a controversy between *citizens of different States*, or a controversy between citizens of the same State claiming under grants of different States, or a controversy 10
between citizens of a State and foreign States citizens or subjects, which are the only cases in which this Act gives the right of removal in respect of citizenship without regard to subject matter.

The controversy is between the State of South Carolina and the defendants, Corbin & Stone, co-partners, both citizens of South Carolina at the time when the cause of action arose, and Stone, the Plaintiff in error, having removed from the State when the suit was commenced.

"A suit in which a State is plaintiff cannot be removed 11
from a State into a United States Court * * * Since it

cannot, without a manifest absurdity, be affirmed that the plaintiff is a *citizen* of the State in which the suit is brought."

Washington J. in Den *ex dem* The State of New Jersey vs. Babcock, 4 Wash. C. C. 345.

Removal Cases 100, U. S., 457.

"Under the second section of the Act of 1875, a suit can-
12 not be removed from a State Court to the Circuit Court unless either all the parties on one side of the controversy are citizens of different States from those on the other side, or there is in such a suit a separable controversy wholly between some of the parties who are citizens of different States, which can be fully determined as between them.

Hyde v. Ruble, 104 U. S., 407.

N. J. Central R. R. vs. Mill, 113 U. S., 249.

Fourth. The defendant Stone is not entitled to remove the
13 case under the last clause of Section 2 of Act of 1875.

The suit is against the defendants, Corbin & Stone, as copartners, for money had and received by them for the use of the State of South Carolina, a joint cause of action of which there cannot be a final determination without the presence of both defendants, and is not, therefore, a controversy which is wholly between citizens of different States, and which can be fully determined between them.

"The rule is now well established that this clause in the section refers only to suits where there exists a separate and
14 distinct cause of action, on which a separate and distinct suit might have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other. To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side, and citizens of different States on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun."

15 "A defendant has no right to say that an action shall be several which a plaintiff elects to make joint.

"The cause of action is the subject matter of the controversy, and that is for all the purposes of the suit whatever the *plaintiff declares it* to be in his pleadings. * * The controversy is the case, and the case is not devisable."

Louisville and Nashville R. R. Co. vs. Ide, 114 U. S., 52.
Putnam vs. Ingraham, Ib., 55.
Ayres vs. Wiswall, 112 U. S., 187.
Hyde vs. Ruble, 114 U. S., 104. 16
Pirie vs. Tvedt, 115 U. S., 41.
Starin vs. New York, 115 U. S., 248.

"It is said, however, that by the New York Code of Procedure, 'judgment may be given for or against one or more plaintiffs,' and for or against one or more defendants, and under this it has been held that when several are sued upon a joint contract, and it appears that only a portion are bound, the plaintiff may recover against those who are actually liable. The same rule undoubtedly prevails in 17
many other States," (and it is so in South Carolina,) "but this does not make a joint contract several, nor divide a joint suit into separate parts. It may expedite judicial proceedings, and save costs, but it does not change the form of the controversy, that is to say, the case. The plaintiff can still sue to recover from all, though he may be able to succeed only as to part."

Louisville and Nashville R. R. Co. vs. Ide, 114 U. S., 54.

III.

The motion made by Attorney-General Youmans in the 18
Circuit Court of the United States, in April, 1880, was not in form to "remove" or "remand" the cause to the State Court, as stated in Transcript, p. 6, f. 11, and in plaintiff's Brief, p. 6, but that the case be stricken from the docket, as improvidently docketed. (Transcript, p. 129, f. 216).

"If the cause be not one which is removable from the State to the United States Court, it ought not to be placed on the docket of the latter; and if it should be *improvidently* placed on that docket, either by the order of the Court, or without it, it can never be too late to remand it to the Court from which 19
it was improperly removed.

It is impossible for the Court to take cognizance of it unless it was legally removed." (Den. *ex dem.* N. J. vs. Babcock, Wash. C. C., 345.)

This is important in controvention of the statement plaintiff's Brief, p 6: "The jurisdiction was exclusively vested in the Federal Court. *This fact was thoroughly recognized by the Attorney-General when he, in that form, made the motion to remand to the State Court.*"

20 But if regarded as a motion to remand, it should have been granted, because, as we have endeavored to show, it was a case in which, by law, the Circuit Court could have no jurisdiction.

The fifth section of the Act of 1875 makes it the duty of the Circuit Court to dismiss or remand the case whenever it appears to its satisfaction that the "suit does not, really and substantially, involve a dispute or controversy properly within the jurisdiction of the Circuit Court."

21 If the case is not one of Federal jurisdiction, it must be dismissed or remanded at any stage when the fact appears, or or is duly established."

"The Act of 1875, Section 5, provides that if 'at any time' after the removal the non-Federal character of the case shall appear, 'the Circuit Court *shall* proceed no further therein; but shall dismiss the suit, or remand it to the Court from which it was removed, as justice may require.'"

Dillon, p. 73, 75, note, and cases cited.

22 The failure of the Circuit Judge to dismiss or remand the suit was error, and this Court will so regard it in giving judgment upon the Writ of Error to the Supreme Court of the State of South Carolina. As said by Justice Miller, in his dissenting opinion in the case of *Railroad Co. v. Mississippi*, 102 U. S., 142.

"It is always a matter of delicacy when a cause of which a Court has undoubted jurisdiction is transferred at the instance of one party, to another Court of concurrent jurisdiction. It is especially so when the transfer is to be made to a
23 Federal from a State Court, without regard to the consent of the latter, and against the objection of the other party.

In such a case the right of removal should be made very clear on their application for that purpose. And when the application has been refused, and the State Courts, up to the highest to which the cause can be carried, have considered and decided it upon its merits, the judgment finally rendered should not be treated as a nullity, unless the case upon which the want of jurisdiction of these Courts depends is made very plain indeed." 24

IV.

The argument of the attorney for plaintiff in error does not meet the objection that the Circuit Court is without jurisdiction of this case, nor that the defendant Stone is not entitled to remove.

The opinion of the Supreme Court of the State of South Carolina sufficiently answers the argument of the plaintiffs in error based upon the cases as to discounts legal or equitable against the United States, cited in his Brief, and also cited before the State Supreme Court, by showing that they all grew out of the Act of Congress of 1797. (Transcript, p. 127, fol. 210–214). 25

Ch: Richardson Miller
Atty Genl So Ca

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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885.

WILLIAM STONE, Plaintiff in Error.
vs.
THE STATE OF SOUTH CAROLINA, Defendant in Error. } No. 144.

Error to the Supreme Court of the State of South Carolina.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

The complaint (f. 29) averred a joint liability of Corbin & Stone, as copartners, to the State of South Carolina for money of the State had and received by them as copartners, and prayed a joint judgment.

The complaint was served on Stone, the plaintiff in error, on the 27th December, 1877 (f. 6).

Corbin & Stone filed several answers on the 18th February, 1878 (f. 6).

The petition of Stone for removal was filed on the 27th April, 1878 (fol. 11). Stone did not offer a bond with surety, but offered his own bond and two U. S. bonds (f. 10). The condition of the bond is to enter in the Circuit Court "on the first day of its session" (f. 9).

The ground on which the removal was asked was that the defendant was a citizen of New York, and the plaintiff

(viz., the State of South Carolina,) was a citizen of the State of South Carolina (f. 9).

There was a verdict against the defendant (f. 21), but no judgment appears anywhere in the record.

Corbin and Stone appealed to the Supreme Court of South Carolina. That court affirmed the judgment of the Circuit Court (f. 49).

The writ of error was sued out *by Stone* on the 15th of March, 1882, (f. 1,) and the citation was served on April 12th, 1882 (f. 223).

It does not appear that any bond (bail in error) was given by Stone, or that Corbin was summoned and severed.

Motion to Dismiss.

The defendant in error moves to dismiss the writ on the following grounds:

1. That no judgment against Stone appears in the record.

2. That no bond (bail in error) appears in the record.

Argument on the Question of Removal.

It is clear that the case is not one removable to the Circuit Court of the United States under the act of March, 1875:

1st. There is no fact in it which is made a ground of removal under the act. It neither arises under the Constitution and laws of the United States, nor is it between citizens of different States.

2d. It presents a fact which renders it non-removable under the act; it is a controversy which cannot be fully determined as between the State of South Carolina and Stone.

As to the first point the language of the second section of the act of March 3d, 1875, is plain. The record shows one party to this suit to be a State, and the other to be a citizen, and shows no Federal question.

The second point is settled by the decision of this court in Louisville Railroad Co. *v.* Ide, 14 U. S., 52. It would be clearly the duty of the Circuit Court to remand the case.

But the plaintiff in error seeks to bring himself within the act of 1875 by averring on oath that the plaintiff is a citizen of another State, and that the cause of action is determinable without the presence of Corbin. Both facts are contradicted by the record. These are really questions of law. The plaintiff in error *could not* by evidence establish the allegations of his petition.

The general rule is conceded to be that on the filing of a petition setting up grounds for removal, within the act of March 3, 1875, the case is *ipso facto* removed. It is submitted that this rule does not apply where the whole record does not disclose a removable case.

The act so interpreted might lead to great wrong. In any case in a State court a party by reckless statements contradicting the record might stop the progress of the State court.

It cannot be partly contended that the mere filing of the petition for removal operates the removal. It is conceded that, where in a *removable* case a proper petition for removal is duly filed and the requirements of the act are complied with, the jurisdiction of the State Court ceases. This is a rule of convenience, because great confusion would arise if a State Court could perform valid acts between the filing of the petition and the judgment of this court in the question. For this reason, all such acts are declared void in cases *in which the right to removal existed.*

But it does not seem to have been held, and there does not seem to be any reason founded on the language of the

Statute, or convenience, for holding that in a case not removable the acts of the State Court are void because a petition for removal was filed. The law does not compel parties to go into the Federal Court simply to be sent away. "*Lex neminem ad vana cogit.*"

Removal Cases, 100 U. S., 457.
R. R. Co. *v.* Koontz, 104 U. S., 5.

The only result of reversing the present judgment would be to send the parties into the Federal Court to be sent immediately back into the State Court.

JAMES LOWNDES,
Of Counsel for the Defendant in Error.